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Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM 1987

No.

DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,
an agency of the State of Florida,
Petitioner,

v.

MID-FLORIDA GROWERS, INC. and
HIMROD & HIMROD CITRUS NURSERY,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA
AND APPENDIX**

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QUESTIONS PRESENTED

1. Is there a "taking" of private property for public use within the meaning of the Fifth Amendment, when in the furtherance of an emergency program for the eradication of a public nuisance, state agricultural officials destroy "healthy" but "suspect" citrus plants which have been exposed to citrus canker disease?

2. Under the "nuisance exception" to the "takings" clause of the Fifth Amendment, is a court bound by the legislative power of state agricultural officials to declare a nuisance and to require destruction of plants reasonably exposed to a communicable disease, absent a showing that the destruction of the citrus plants was arbitrary and unreasonable?

3. In determining whether destruction of property pursuant to a health and safety regulation is a "taking," must a court first determine whether the regulation bears a reasonable relationship to the public nuisance it is designed to correct, and find a taking only when the regulation is arbitrary and unreasonable, or may the court apply the "balancing test" of *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) to weigh the individual losses against the public benefit?

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**PETITION FOR A WRIT OF CERTIORARI
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The Petitioner Department of Agriculture and Consumer Services, an agency of the State of Florida, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida, entered in the above entitled proceeding on January 21, 1988, rehearing denied, April 1, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 521 So.2d 101 and is reprinted in the Appendix hereto, p. A-1, *infra*.

The opinion of the District Court of Appeal, Second District of Florida is reported at 505 So.2d 592, and is reprinted in the Appendix hereto, p. A-10, *infra*.

JURISDICTION

Petitioner requests review of a judgment of the Supreme Court of Florida in a civil action for inverse condemnation. The court below held that Petitioner, pursuant to its police power, did not have the constitutional authority to destroy healthy but suspect citrus plants without paying just compensation to Respondents.

Pursuant to 28 U.S.C. §1257(3), Petitioner brings this appeal of a "[f]inal judgment or decree" which questions the validity of Article IV, Section 4 of the Florida Constitution, Sections 570.07(21) and 581.031(6), Florida Statutes (1983), and Rules 5BER84-8 and 5BER84-9, Florida Administrative Code, on the ground that they are repugnant to the Constitution of the United States. Jurisdiction of this Court is also invoked to review the final determination by the Florida Supreme Court of Respondents' claim, set forth in paragraph 19 of the Second Amended Complaint, that they are "entitled to recover damages for the unconstitutional taking of their property in the amount of uncompensated value thereof, plus interest."

a) The Decision Below Does Not Rest On An Adequate And Independent State Ground

In reaching this holding, the Florida Supreme Court never expressly addressed the issue of whether its decision was premised on the Fifth Amendment of the United States Constitution which in part provides "nor shall private property be taken for public use, without just compensation" or on Article X, Section 6 of the Florida Constitution which in part provides "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner." Similarly, the Second Amended Complaint, the judgment of the trial court and the opinion of the Second District Court of Appeal do not indicate whether Petitioner's liability arises out of the Fifth Amendment of the United States Constitution or Article X, Section 6 of the Florida Constitution. Moreover, because the Supreme Court of Florida and the Second District Court of Appeal rely upon both

federal and Florida opinions in finding that Petitioner was obligated to pay full and just compensation, there is no indication in the Florida decision that the Florida Constitution provides a bona fide, separate, adequate and independent ground for this decision. In addition, it should be noted that some of the Florida decisions cited in the Florida Supreme Court opinion also rely on this Court's interpretation of the takings clause to determine when the valid exercise of police power stops and an impermissible encroachment on private property begins. See e.g., *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1381 (Fla. 1981), *relying upon*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *State Plant Board v. Smith*, 110 So.2d 401, 405 (Fla. 1959), *relying upon*, *Mugler v. Kansas*, 123 U.S. 623 (1887)¹.

Furthermore, inasmuch as a Florida court may have construed state law narrowly to avoid a perceived conflict with the Fifth Amendment, this Court has jurisdiction to correct a state court's incorrect perception of federal constitutional law where "a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984).

b) *The Decision Below Was A Final Judgment Or Decree*

Although the instant case was remanded to the Circuit Court for a trial on the damages owed by Petitioner, the judgment reviewed by the Florida Supreme Court was final for purposes of 28 U.S.C. §1257 under the "pragmatic" approach suggested in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). In *Cox Broadcasting*, *supra* at 482-483, this Court recognized that a judgment may be considered final under 28 U.S.C. §1257 where:

1. Petitioner's position that Article X, Section 6 of the Florida Constitution is not an adequate and independent state ground is fully supported by this Court's ruling in *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) that "... when . . . a state court decision fairly appears . . . to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

“reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come . . . [and] if a refusal immediately to review the state court decision might seriously erode federal policy . . . [and the federal issue] itself has been finally determined by the state courts for purposes of the state litigation?”

In the instant case the federal question — whether the Fifth Amendment guarantee of full and just compensation extends to the destruction of healthy but suspect citrus plants by the Petitioner — has been finally determined by the Florida Supreme Court. In addition, because of the parallel constructions of the Fifth Amendment of the United States Constitution and Article X, Section 6 of the Florida Constitution by Florida courts, reversal of the Florida Supreme Court’s holding would probably preclude further proceedings under both constitutional provisions. As subsequently explained in the Reasons for Granting the Writ, refusal to immediately review the judgment of the Supreme Court of the State of Florida might seriously erode federal policy, and a reversal of this judgment on the federal issue would preclude any further litigation on the “relevant cause of action,” *see, Cox Broadcasting, supra*; therefore the finality requirement of 28 U.S.C. §1257 is satisfied. *See, Goodyear Atomic Corp. v. Miller*, 56 U.S.L.W. 4447, 4448 (U.S. May 23, 1988).

Yet, the granting of certiorari in this case would appear to conflict with the mechanical approach required in *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U.S. 251 (1917) where this Court refused to issue a petition for a writ of certiorari to review a condemnation order entered in an eminent domain proceeding until the Washington Supreme Court had finally reviewed the amount of damages which were to be determined in a subsequent trial. As stated in dicta in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 632-633 (1981), *Grays Harbor Co. v. Coats-Fordney Co.*, *supra*, “has been regarded as a classic example of a decision not reviewable in this Court because it is not ‘final’ [since in] . . . such a case, ‘the remaining litigation may raise other

federal questions that may later come here.' " *quoting from, Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945).

But, *Grays Harbor Co. v. Coats-Fordney Co.*, is distinguishable from this instant case because in the former case plaintiff's theory of liability rested exclusively on the premise that the petition for condemnation was contrary to the Constitution of the United States, while in the latter Respondents have attempted to establish their action for inverse condemnation under the Florida and United States Constitutions. This distinction is significant since in *Grays Harbor Co. v. Coats-Fordney Co.*, a federal question would necessarily be raised in the eminent domain proceeding since as recognized in *San Diego Gas & Electric Co. v. San Diego*, *supra*, 450 U.S. at 633, "the federal constitutional question embraces not only a taking, but a taking on payment of just compensation," *quoting, North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973). However, a review of the record in the case *sub judice*, after the Florida Supreme Court filed its opinion on January 21, 1988, clearly reveals that no federal issue was ever raised in the subsequent trial to determine the amount of damages owed to Respondents. *See generally, Philadelphia v. New Jersey*, 437 U.S. 617, 620 n.3 (1981) (where this Court reviewed proceedings in the trial court after remand from the New Jersey Supreme Court to determine the finality issue). In March of 1988, a Pre-trial Order was entered which provided that Petitioner was obligated as a matter of law to pay full and just compensation to Respondents for their losses in accordance with the Constitution of the State of Florida. As a result, at the trial for damages held in March 1988, the damages issue was tried without reference to the Fifth Amendment and the Jury Instructions were based exclusively on the Florida Constitution. Presumably, Respondents failed to pursue their claim under the Fifth Amendment because of Florida's expansive allowance of damages for business losses, costs and attorney's fees under Sections 73.071, 73.091 and 73.092 of the Florida Statutes (1983). Thus, as can be verified from the transcript of the subsequent trial on damages, the federal issue raised in this case is limited to the question of liability, i.e., whether there was

a taking of property within the meaning of the Fifth Amendment, and this issue has been finally determined by the Supreme Court of Florida.

Moreover, the strictly imposed restraints of finality advocated in *Grays Harbor Co. v. Coats-Fordney*, *supra*, should not be mechanically applied since the “considerations that determine finality are not abstractions but have reference to very real interests — not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system.” *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948). *See also*, *Budnich v. Becton Dickinson and Co.*, 56 U.S.L.W. 4453, 4454 (U.S. May 23, 1988). Because as explained in the Statement of the Case, the Department is already defending eleven citrus canker cases and since the potential liability of Petitioner to these plaintiffs and other potential plaintiffs may be in excess of \$250 million dollars, any inconvenience and cost of piecemeal review (which is remote because there are no unresolved federal questions pending in this case) is greatly outweighed by the danger of denying justice by delaying this petition on “finality” grounds. Thus, while this court has continued to recognize the principles announced in *Grays Harbor Co. v. Coats-Fordney Co.*, *supra* (see e.g., *San Diego Gas & Electric Co. v. San Diego*, *supra*, 450 U.S. at 632-33), these artificial barriers to finality which are primarily based on concerns that a federal issue will necessarily be raised in the subsequent trial on damages in an eminent domain proceeding are inapplicable and contrary to “the smooth functioning of our judicial system” where it can be demonstrated that no federal issue was raised in the subsequent trial on damages.

UNITED STATES AND FLORIDA CONSTITUTIONAL PROVISIONS AND STATE STATUTES AND REGULATIONS INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution and Article IV, Section 4 and Article X, Section 6 of the Florida Constitution are reproduced in the Appendix to

this petition (App. p. A-19 - A-21).

In addition, Sections 570.07 and 581.031 of the Florida Statutes and Emergency Rules 5BER84-8 and 5BER84-9 of the Department of Agriculture and Consumer Services are reproduced in the Appendix to this Petition (App., p. A-22 - A-43).

STATEMENT OF THE CASE

In 1984, a virulent and acutely infectious agricultural bacterial strain, commonly known as "citrus canker," was diagnosed in a Central Florida citrus tree nursery. State and Federal regulatory authorities, relying on scientific data and techniques then available, reacted promptly and aggressively by instituting a massive eradication program which ultimately resulted in the destruction of almost eighteen million nursery trees, some actually infected and others exposed to infection. An inverse condemnation suit by two nurserymen whose plants were destroyed and a finding by the Florida Supreme Court that the eradication program was a proper exercise of police power but nonetheless constitutionally compensable, is the basis for this Petition.

Citrus canker is one of the most destructive diseases of citrus and is characterized by extensive damage to the twigs, leaves, and fruit of plants in the family Rutaceae (citrus and citrus relatives). Canker was first identified in the United States in 1913, and first appeared in Florida in 1914. By 1915, the disease was widespread in Florida and the State Plant Board, now known as the Department of Agriculture and Consumer Services, Division of Plant Industry, was created to combat the disease. Over the next 14 years, three million nursery trees and 257,000 grove trees were destroyed at the cost of many millions of dollars. No compensation was paid for plants or trees destroyed. Florida was finally declared free of citrus canker disease in 1927. During this early period, canker also infested Texas, Louisiana, Mississippi and Alabama. In 1947, Texas was the last state to eliminate canker. From 1947 to August 1984, citrus canker did not exist in the United States.

The U.S. Department of Agriculture ("USDA"), and the Florida Department of Agriculture and Consumer Services ("FDACS") have consistently taken strong measures to prevent the reintroduction of citrus canker in Florida. These measures include importation restrictions and domestic quarantines of fruit from countries where citrus canker was found to occur. In 1982, the USDA, Animal and Plant Health Inspection Service ("APHIS") and Plant Protection and Quarantine ("PPQ"), together with cooperating State departments of agriculture (including Florida) adopted an "Action Plan — Citrus Canker Disease" providing emergency measures for implementation in the event of an outbreak of citrus canker.² The Plan provided for an eradication program which required immediate destruction of infested plants and defoliation of nearby plants. The approved eradication treatment for nurseries was to destroy all citrus plants at the nursery where an infected host plant was discovered.³ The action plan also noted that the bacteria seems to be able to survive on branches and bark in a dormant state for several years. The infection spreads over short distances by water splashing and normal farming activities, and over longer distances by movement of infected plants and nursery stock.

The August 27, 1984 discovery of citrus canker at Ward's Nursery in Polk County, Florida was immediately regarded by agricultural officials as a very severe crisis. The Secretary of Agriculture issued a declaration of emergency, effective September 11, 1984 stating:

2. The Plan stated:

"Eradication of an outbreak of citrus canker disease in the continental United States is essential. The eradication program will require the immediate destruction of infected host plants and the use of defoliation to prevent any subsequent infection of nearby plants." USDA, *Emergency Programs Manual*, Part IV.C., "Citrus Canker Action Plan," p. 15 (1982).

3. "In nurseries where an infected host plant is found, all host plants in the nursery will be removed and burned or disposed of in an approved landfill. No citrus or other host plant species will be planted in the nursery for a period of 2 years, provided a grass-free condition is maintained. Otherwise, the interval before replanting is allowed will be 5 years." *Id.* at p. 17.

“Whereas, a serious infestation of citrus canker exists in parts of Florida; and

Whereas, citrus canker is a devastating bacterial disease which rapidly and aggressively infects citrus and which can be spread easily causing catastrophic damage to entire citrus growing areas;

Now therefore, . . . I declare that there is an emergency which threatens the citrus growing industries of this country and I authorize the transfer and use of such sums as may be necessary . . . for the conduct of a program to detect and identify citrus canker infested areas, to control and prevent the dissemination of citrus canker to noninfested areas in the United States, and to eradicate citrus canker wherever it may be found. John R. Block, Secretary of Agriculture.” 49 Fed. Reg. 36421.

The FDACS adopted emergency rules for the eradication of citrus canker on September 19, 1984. These emergency rules found “citrus canker is a highly contagious, infectious, highly destructive pathogen and a public nuisance.” 5BER84-8(10). The emergency rules required the destruction of both infected plants and “suspect” plants. Emergency Rule 5BER84-9(1)(t) defined “suspect citrus canker infested or infected plant” as a plant which has been subjected to infection by its presence in an infested area or having been removed from an infested area within a specified time period. The provisions of the emergency rules which required destruction of Respondents’ trees are as follows:

(4) Infested or infected status of a citrus tree due to its origin from a quarantined nursery or quarantined stock dealer is determined as follows:

(a) All citrus trees from any nursery or stock dealer declared infested or infected since January 1, 1984, are considered as infested or infected and are referred to in this rule as suspect citrus canker infested or infected plants; . . .

(5) Procedures to be followed in nurseries where plants as described as suspect citrus canker infested or infected plants are found:

(a) Destroy by burning or other methods as may be prescribed by the USDA or the department, any plant as described in (4)(a) . . . above.

(b) Destroy by burning or by other methods that may be prescribed by the USDA or the department all citrus plants within 125 feet of the plant described in (4)(a) . . . above."

On September 14, 1984, the USDA issued interim rules prohibiting interstate movement of citrus from Florida. These rules stated that the Deputy Administrator had determined that an emergency existed due to the possibility that citrus canker could be spread to non-infested areas of the United States, and because "a situation exists requiring immediate action to better control the spread of this pest."

The interim rule amended 7 CFR, Part 301 by adding a new sub-part ("Sub-part — Citrus Canker" 7 CFR 301.75) which prohibited movement of fruit from Florida except under a limited permit, which would be issued only under certain circumstances, among which were a determination that the fruit had been treated by a thorough wetting with a chlorine solution. The interim rule prohibited any movement of citrus from Florida to other citrus growing regions of the United States (American Samoa, Arizona, California, Hawaii, Louisiana, Puerto Rico and Texas) 49 Fed. Reg. 36623.

Between September 17, 1984 and October 5, 1984, eight nurseries that had received plants through Ward's Nursery tested positive for citrus canker. A total of 47 nurseries had obtained citrus materials from Ward's Nursery during the months prior to discovery of citrus canker there. The Respondents, Himrod & Himrod Citrus Nursery and Mid-Florida Growers, Inc., were two of the nurseries that received plant materials from Ward's Nursery

but did not test positive for canker prior to the eradication procedures described below.

The Himrod Nursery had received approximately 9,000 budehyes taken from approximately 1,000 budsticks (young twigs) cut from trees at Ward's Nursery in April 1984. These budehyes were grafted onto "seedling liners" (young citrus trees grown from seeds), and placed in a greenhouse in the Himrod Nursery. The Mid-Florida Nursery similarly received approximately 9,000 budehyes from Ward's Nursery, from which it budded approximately 7,500 seedlings. These seedling trees were likewise placed in greenhouses at the Mid-Florida Nursery.

Both nurseries received immediate final orders from FDACS finding that the nursery received citrus trees from a nursery infected with citrus canker, that the Citrus Canker Technical Advisory Committee (established jointly by USDA and FDACS in September 1984) had recommended and the Department had adopted emergency rules requiring eradication of such trees, and that implementation of eradication procedures was necessary at each nursery. The orders required destruction of all plants received from the infected nursery, and all plants within 125 feet of such plants pursuant to 5BER84-9(5). Both orders recited that on September 11, 1984, the U.S. Secretary of Agriculture had issued a declaration of emergency because of citrus canker and contained the following additional findings:

"FINDINGS OF IMMEDIATE THREAT

15. . . .In view of the destructive nature of this pathogenic bacterial organism and in view of its pressing occurrence within the State of Florida, immediate steps must be taken to eradicate citrus canker before the infected area expands and results in economic disaster for Florida's 1.2 billion dollar citrus industry and ultimately adversely affects the welfare of the citizenry of the State of Florida. In view of the specific facts and reasons above mentioned, and in accordance with the constitutional authority conferred upon the

Commissioner of Agriculture by the Florida Constitution, Article IV, Section 4, and with the authority stated in Florida Statutes, Sections 570.07(21) (to declare an emergency) and 581.031(7), I do hereby find that an immediate danger to the public health, safety and welfare exists, justifying the issuance of this Immediate Final Order.⁴

On October 17, 1984, the U.S. Secretary of Agriculture issued "Declaration of Extraordinary Emergency Because of Citrus Canker." This Declaration stated after finding that a serious infestation of canker existed in Florida:

"Citrus canker constitutes a severe threat to citrus in the United States, and thereby seriously burdens interstate and foreign commerce. Therefore, it is determined that an extraordinary emergency exists because of this outbreak of citrus canker in Florida.

* * *

This declaration of extraordinary emergency authorizes the Secretary to: (1) Seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of, in such manner as the Secretary deems appropriate, any product or article of any character whatsoever, or means of conveyance by which the Secretary has reason to believe is infested or infected by, or contains citrus canker; (2) quarantine, treat, or apply other remedial measures to, in such manner as the Secretary deems appropriate, any premises, including articles on such premises, which the Secretary has reason to believe are infested or infected by citrus canker." 49 Fed. Reg. 41268.

After the issuance of this declaration of extraordinary emergency, all of the immediate final orders for destruction of

4. The order was signed on behalf of Doyle Conner, Commissioner of Agriculture by Charles Poucher, Project Director and Gordon Johnson, Deputy Project Director, USDA. The orders were dated October 16, 1984 but the actual destruction of trees commenced October 7, 1984, and was concluded on October 17, 1984.

infected or suspect trees were issued jointly by USDA and FDACS.⁵

On November 21, 1984, the Governor of the State of Florida issued a proclamation convening a special session of the Florida Legislature to address the citrus canker threat and to consider funding methods to alleviate this crisis. The Legislature convened on December 6, 1984 and adopted Chapter 84-457, Laws of Florida, which recognized that citrus canker threatened citrus production in Florida and authorized certain funds to be used to financially assist parties whose citrus trees were lawfully destroyed in compliance with the state-federal eradication program, and made this allocation dependent on federal matching funds. The Act also provided that although the State was not legally obligated to provide compensation and financial assistance to affected growers it would be in the best interest of the State that no person may receive financial assistance from the State unless he releases the State from liability for any losses arising out of the eradication of citrus canker.

After a similar Congressional appropriation, the USDA adopted an interim rule providing for payment of compensation for plants destroyed because of citrus canker. The summary explanation of this rule stated that this action was necessary "in order to obtain cooperation from affected persons in the citrus canker eradication effort in Florida."⁶ 50 Fed. Reg. 9261. Both Respondents in this case received compensation from both the State and Federal

5. USDA and FDACS entered into a Cooperative Agreement #12-16-83-023 (Accounting Code 55383-01485) effective as of October 1, 1984 "to further program activities necessary to achieve eradication of citrus canker." By this Agreement, the parties agreed to follow the 1982 Action Plan as providing basic guidance and direction for program activities. The Work Plan attached to the Agreement also required that FDACS destroy infected and exposed trees by burning.

6. The rule established compensation amounts representing 50% of the replacement values of the destroyed plants as determined by the Deputy Administrator, based on information provided by the Citrus Canker Indemnity Work Group (a group composed of representatives of USDA-ARS, USDA-APHIS, the University of Florida, and FDACS) and representatives from the citrus industry. The replacement values of the plants were based on the average costs of purchasing, planting and maintaining the plants.

governments, yet, they estimated that the financial assistance received was only 27 to 30% of "market value."

In 1985, Respondents filed in the Circuit Court of the Tenth Judicial Circuit in and for Hardee County, Florida, an inverse condemnation complaint against FDACS alleging a taking of their property without just compensation. A non-jury trial was held in September 1986, resulting in an "Order of Liability for Taking" dated October 10, 1986, which made the following findings:

"1. A police power circumstance existed to protect the economic public welfare, and Defendant's actions with respect to Plaintiffs' nursery stock were within its police power.

2. No competent evidence supports the states [sic] concern that the Plaintiffs' nursery stock was infected or diseased so as to justify destruction. The most that can be said for the Defendant is that the Plaintiffs' nursery stock was obtained from a single source where some form of citrus canker was detected. The Plaintiffs' careful methods of operation, and the fact that no citrus canker in any form was discovered in the Plaintiffs' nursery stock, leads to the *legal* conclusion that no citrus canker was present. It is the responsibility of the state to make reasonable efforts to ascertain the presence of infection or disease, under the circumstances of this case. Therefore, a taking has occurred in this instance and Plaintiffs are entitled to full and just compensation."

The Florida Department of Agriculture and Consumer Services appealed this decision to the District Court of Appeal of Florida, Second District, which affirmed the trial court's decision by an opinion filed April 10, 1987. The Court of Appeal discussed state and federal case law concerning police power takings, and, with primary reliance on the U.S. Supreme Court cases of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), held as follows:

"We hold that while the state validly exercised its police powers in destroying the citrus trees, a taking occurred when the healthy trees were destroyed. The nursery owners must be compensated. We understand the difficulties the state faces in confronting citrus canker. Canker, unlike spreading decline, is a particularly resilient disease which may be spread by both natural and artificial means and which may lay dormant in healthy plants for some months before manifesting signs of the disease. We understand the difficulties in determining whether canker is present in healthy trees. Destruction of the healthy trees, however, assured the continued vitality of Florida's most valuable citrus industry. Because destruction of the healthy trees benefited the entire citrus industry and, in turn, Florida's economy, the cost is more properly spread among the many rather than the few who were unfortunate enough to have purchased budsticks from the infected nursery. As the United State Supreme Court stated in *Penn Central*, citing to *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960), 'the Fifth Amendment's guarantee . . . is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *Penn Central*, 438 U.S. at 123, 98 S.Ct. at 2659.

While we feel our disposition is correct, because this case involves such an important area of the law and because this malady is likely to revisit us, we certify the following question to the Florida Supreme Court as one of great public importance:

WHETHER THE STATE, PURSUANT TO ITS POLICE POWER, HAS THE CONSTITUTIONAL AUTHORITY TO DESTROY HEALTHY, BUT SUSPECT CITRUS PLANTS WITHOUT COMPENSATION?" 505 So.2d at 595-6.

The Supreme Court of Florida, by opinion dated January 21, 1988, rehearing denied April 1, 1988 [See *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc. and Himrod & Himrod Citrus Nursery*, 521 So.2d 101 (Fla. 1988)]

answered the certified question negatively and therefore affirmed the finding that a taking had occurred and just compensation was required. The Court's opinion states:

"The Department contends that no taking occurred in the instant case because the trees were destroyed in order to prevent a public harm. We, however, agree with the district court's conclusion that destruction of the healthy trees benefited the entire citrus industry and, in turn, Florida's economy, thereby conferring a public benefit rather than preventing a public harm. Although this factor alone may not be conclusive, we have previously recognized that if a regulation creates a public benefit it is more likely that there is a taking . . .

The Department next urges that the certified question must be answered in the affirmative because the state, in destroying the trees, validly exercised its police power in conformance with applicable statutes and rules. Although we do not disagree with the Department's contention that the state's order was a valid exercise of its police power, it is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking! *See, Albrecht v. State*, 444 So.2d 8 (Fla. 1984). *See also, Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425, 102 S.Ct. 3164, 3170, 73 L.Ed.2d 868 (1982). As recently stated by the United States Supreme Court, a basic understanding of 'the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.' *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. —, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987):' 521 So.2d at 102-103 [Citations omitted except as shown].

1. "We, therefore, also reject the Department's argument that the trial court, in determining the trees were healthy, ignored agency rules which defined the trees as being suspect and subject to destruction and thereby improperly allowed a challenge to the propriety of agency action in an inverse condemnation proceeding. Although the Department correctly contends that the propriety of an agency's action may not be challenged in an inverse condemnation proceeding, Section 253.763(2), Florida Statutes (1983), the fact that the action was authorized pursuant to agency rules does not, as noted above, preclude a determination that the action constituted a taking . . ." 521 So.2d

Chief Justice McDonald dissented from the decision stating:

The conduct of the department should be reviewed in the light of the perceived emergency confronting the department when canker was found. In hindsight it may be that the department overreacted and confiscated property not needed, but a review of the department's actions should not be made on hindsight. The department had the duty to take emergency measures to prevent an immediate harm — the spread of canker. In viewing its actions from an emergency standpoint, those actions were not unreasonable. The trial judge appeared to base his judgment of inverse condemnation solely on the basis that healthy trees were taken. The issue is not whether the Plaintiffs' trees were actually healthy, but rather whether the government, acting responsibly, had reasons to conclude that they might not have been and that it was necessary to destroy them to prevent the spread of a deadly disease. Viewed in this light, the evidence fails to support a claim for inverse condemnation.' 521 So.2d at 105-6.

The Department timely filed a Motion for Rehearing of the Florida Supreme Court decision, suggesting that the Florida Supreme Court had overlooked the recent opinion of this Court in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. ___, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), which confirmed the "nuisance exception" to the takings clause. The Motion for Rehearing also suggested that the Florida Court had misapprehended the legal and constitutional principles requiring the judiciary to give deference to a legislative declaration of nuisance, as stated in *Powell v. Pennsylvania*, 127 U.S. 678 (1887), cited with approval in *Keystone Bituminous Coal Association v. DeBenedictis*, *supra* at 94 L.Ed.2d 491. The Motion for Rehearing further suggested that the Court had misapplied *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. ___, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), and that the court had improperly failed to apply *Miller v. Schoene*, 276 U.S. 272 (1927), and *Mugler v. Kansas*, 123 U.S. 623 (1887), reaffirmed in *Keystone Bituminous Coal Association*

v. DeBenedictis, supra. The Department also suggested in the Motion for Rehearing that the Florida Court had misapprehended the meaning of "public benefit" versus "public harm" when it failed to use the "reciprocity of advantage" test contained in *Pennsylvania Coal v. Mahon, supra*, 260 U.S. at 415.

The Attorney General of the State of Florida filed a Memorandum in support of the Department's Motion for Rehearing. Rehearing was denied on April 1, 1988. A trial on the damages issue was held, and the Court entered a Final Judgment dated April 26, 1988 in the amount of \$1,943,458.00.

The citrus canker eradication program in Florida resulted in burning of nearly eighteen million trees in 120 nurseries between September 1984 and May 1988. Of these, 30 locations tested positive for canker, and 90 received exposed plant material from nurseries with positive findings. Through January 1988, the State has spent almost \$18 million for eradication of canker, and \$6 million for financial assistance to affected nurserymen. The USDA has spent approximately \$13.5 million for eradication and \$10.5 million for financial assistance.

Many of the affected nurserymen have filed suit. In addition to the instant case which involves only two of the 120 nurseries affected, ten lawsuits are pending in the state or federal courts of Florida; one of these was a class action purporting to represent a class of persons whose trees were burned during the eradication program but the class action allegations were recently withdrawn, and Petitioner anticipates that additional suits, either individual or class, will be filed in the near future. The decision of the Florida Supreme Court in the instant case is being used as precedent in the remaining cases. USDA has been made a party to some of the remaining cases. If the state or USDA is required to pay full compensation for the trees burned, the total damages are expected to exceed \$250 million.

REASONS FOR GRANTING THE WRIT

THE FLORIDA COURT'S FINDING OF A "TAKING" OF PRIVATE PROPERTY FOR PUBLIC USE IN THE CIRCUMSTANCES PRESENTED (a) FAILS TO RECOGNIZE THE NUISANCE EXCEPTION TO THE TAKINGS CLAUSE, and (b) CONFLICTS WITH DECISIONS OF THIS COURT, OF FEDERAL CIRCUIT COURTS OF APPEALS, AND OTHER STATE COURTS OF LAST RESORT.

This case presents the question of whether and under what conditions actions taken by governmental officials for the purpose of protecting public health and safety, specifically for the control, prevention and abatement of a public nuisance, may be considered takings under the Fifth Amendment of the United States Constitution. This case presents a clear opportunity for this Court to distinguish health and safety regulations, or nuisance-type regulations, for which no compensation should be awarded, from land-use regulations which concededly may constitute takings if they "go too far". The Florida Court's decision misapplies the balancing test derived from *Pennsylvania Coal Co. v. Mahon*, fails to recognize the "nuisance exception" to the takings clause, and generally creates an alarming precedent which may effectively restrain governmental officials from responding to current or future crises caused by known nuisances or new diseases of unknown proportions. This case presents an unwarranted extension of this Court's takings jurisprudence, but nonetheless is indicative of the uncertainty and confusion of the law in this area.

The three significant "takings" cases decided by this Court last term⁷ have generated much commentary and speculation as to

7. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. ____, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. ____, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Nollan v. California Coastal Commission*, 483 U.S. ____, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

the future course of the Court's takings jurisprudence⁸. State and federal regulatory officials are now facing damages claims for a wide variety of ordinary governmental functions, from land use and zoning regulations to health and safety regulations, such as those involved in the instant case, with no clear guidance as to the dividing line between permissible regulation and unconstitutional takings.

Illustrative of the current dilemma is Executive Order 12630 issued by President Reagan on March 15, 1988, entitled "Governmental Actions and Interference with Constitutionally Protected Property Rights." 53 Fed. Reg. 8859. By this executive order, the President, in recognition of the recent Supreme Court decisions and of the need to protect the "public fisc" from undue or inadvertent burdens, directed the Attorney General to promulgate, no later than May 1, 1988, "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings," and to disseminate these guidelines to all federal agencies and units of the Executive department no later than July 1, 1988⁹. Concerning public health and safety regulations, the Executive Order states:

"Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and

8. See, e.g., *Peterson Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J., 335 (1988); Simon, *The Supreme Courts 1987 "Takings" Triad: An Old Hat in a New Box or a Revolution in Takings Law?*, 1 U.Fla.J.L. and Pub. Pol'y 103 (1987); Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 Urban Lawyer 389 (1988).

9. As of the date of this petition, the guidelines have not been made public.

be no greater than is necessary to achieve the health and safety purposes.' 53 Fed. Reg. at 8861.

The pragmatic difficulties faced by public health and safety officials are self-evident. Too little regulation may result in insufficient safeguards, and therefore the spread or proliferation of disease, pollution, or unsafe conditions. Innocent citizens affected by the lack of sufficient health and safety regulations may claim that the failure of the responsible governmental agency to adequately protect their property amounts to a taking.¹⁰ Conversely, a conservative approach may result in a court finding, as in this case, of a taking due to over-regulation. The fine line between these points is difficult or impossible to define under the vague and indefinite standards reflected in the Executive Order, which is a direct outgrowth of uncertainties created by recent cases.

The Florida citrus canker crisis presents a clear picture of the results of such a confusing judicial policy. Citrus canker was already known as a devastating disease in this nation and had once been eradicated at great cost. Federal and state regulatory officials, as a cautionary measure, had adopted a contingency plan for eradication of citrus canker if another outbreak occurred, and followed that plan when it did occur. Since canker is spread by invisible bacterial organisms that can be harbored in exposed trees without symptoms for an extended period of time, the eradication

10. This possibility is dramatically presented by a case decided two years before the canker outbreak in Florida, *South Florida Growers Association, Inc. v. U.S. Department of Agriculture*, 554 F.Supp. 633 (S.D. Fla. 1982). In that case, canker had been discovered in limes grown in the State of Colima, Mexico, and the USDA immediately placed an embargo on importation of all citrus plants and fruits from Mexico. Two months later, the USDA modified the embargo by allowing importation of citrus from areas of Mexico other than Colima. A group of Florida citrus growers sought and obtained an injunction requiring public notice and hearings before the embargo could be lifted. The court found that the growers had a property right in the protection of their citrus groves, which could be irreparably damaged by importation of citrus contaminated with canker. The court stated "Failure to provide adequate protection when property is placed in jeopardy by governmental action can amount to an unconstitutional 'taking' of property by destroying it or by exposing it to the risk of destruction. It is this threatening of the Plaintiffs' property right by the governmental action that entitles Plaintiffs to due process." 554 F.Supp. at 637. [citations omitted].

process was deemed to require destruction of both infected and exposed citrus trees.

Through the type of federal-state cooperation demonstrated in the citrus canker eradication program in Florida, a potential disaster of cataclysmic proportions in terms of widespread canker disease in the United States was averted!¹¹ Nonetheless, catastrophe still looms because the state agricultural agency will be required to pay damages of an unprecedented magnitude, if the decision below stands, for merely seeking to prevent the spread of citrus canker to uninfected areas.

The precedential importance of the decision below cannot be denied. The ramifications extend far beyond the citrus industry to virtually all regulations of animal and plant diseases whereby destruction or quarantine (or even chemical treatment, if that reduces the property value) of infected or exposed plants and animals may be required, and perhaps even to other types of health and safety regulation.

The time has come to draw a clear distinguishing line between health and safety regulations on the one hand, and non-nuisance, land use regulations on the other. This Court, and the highest court of virtually every state in the union has recognized that health and safety regulations adopted in the exercise of the police power, do not amount to takings of private property for public use. This Court's decision in *Mugler v. Kansas*, 123 U.S. 623 (1887) is recognized as the traditional foundation for this line of cases. In holding that a Kansas statute prohibiting manufacture and sale of intoxicating liquors was not a taking of the Petitioner's brewery, this Court stated:

The principle that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the Constitutions of nearly

¹¹ Unfortunately, Executive Order 12630 appears to mark the end of federal-state cooperation in these types of programs, due to the potential liability for unanticipated takings.

all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, — equally vital, because essential to the peace and safety of society, — that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.' 123 U.S. at 665.

* * *

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. . . . The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.' 123 U.S. at 668-69.

See also Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); *Lawton v. Steele*, 152 U.S. 133 (1893); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Consistently, in *Miller v. Schoene*, 276 U.S. 272 (1928) the Court upheld denial of compensation to a person whose red cedar trees were destroyed under a Virginia statute which prohibited keeping red cedar trees which are or may be a source of a communicable plant disease known as cedar rust within a certain radius of any apple orchard. The Court noted that the State Legislature had been forced to choose between protecting one class of property (apple orchards) and another (cedar trees).

“When forced to such a choice, the state does not

exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. . . . And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute. For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process." [Citations omitted.] 276 U.S. at 279-80.

See also *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1948); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

This line of cases, presenting the "nuisance exception" to the Takings Clause, was recognized and reaffirmed by this Court last term in *Keystone Bituminous Coal Association v. DeBenedictis*, *supra*, and was implicitly distinguished from land use type regulatory takings under the rule stated in *Pennsylvania Coal v. Mahon*, *supra*. The majority opinion of Justice Stevens stated: "Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis." 480 U.S. ___, 94 L.Ed.2d at 490. The Court rejected the implicit assertion that *Pennsylvania Coal* had overruled those cases which "focused so heavily on the nature of the state's interest in the regulation," referring to the line of cases stemming from *Mugler v. Kansas*, and observed that *Miller v. Schoene* was decided five years *after* the *Pennsylvania Coal* decision. 480 U.S. ___, 94 L.Ed.2d at 491. The Court said that in *Miller v. Schoene*, it was clear that the State's exercise of its police power to prevent the impending danger of apple rust was justified, and did not require compensation, and that subsequent cases had reaffirmed the important role that the nature of State action plays in the takings analysis.

"The Court's hesitation to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal*.²⁰ Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. [Footnote and citations omitted.] These restrictions are "properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5, 93 L.Ed. 1765, 69 S.Ct. 1434, 7 ALR 2d 1280 (1949). Long ago it was recognized that 'all property in this Country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' *Mugler v. Kansas* . . . , and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it."²² 94 L.Ed.2d at 492.

20. The special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not "taken" anything when it asserts its power to enjoin the nuisance-like activity . . . However, as the current Chief Justice has explained: "The nuisance exception to the taking guarantee is not coterminous with the police power itself." *Penn Central Transport Co.*, 438 U.S. at 145, 57 L.Ed.2d 631, 98 S.Ct. 2646 (Rehnquist, J. dissenting). This is certainly the case in light of our recent decisions holding that the "scope of the 'public use' " requirement of the Takings Clause is 'coterminous with the scope of the sovereign's police powers.' " [Citations omitted.]

22. Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance. [Citations omitted.] It is hard to imagine a different rule that would be consistent with the maxim "Sic utere tuo ut alienum non laedas." [Use your own property in such manner as not to injure that of another.] See generally *Empire State Insurance Co. v. Chafetz*, 278 F.2d 41 (C.A. 5 1960). As Professor Epstein has recently commented: "The issue of compensation cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, this question is resolved against the claimant." *Epstein, supra*, at 199."

The Court in *Keystone* did not rest its decision on this factor alone, but held that the petitioner's taking claim also failed because of failure to show a diminution of value sufficient to satisfy that test as set forth in the regulatory takings cases.

The dissent by Chief Justice Rehnquist, joined by Justices Powell, O'Connor and Scalia, also recognizes the "nuisance exception" to the Takings Clause, but differs with the majority as to its scope. 480 U.S. ____, 94 L.Ed.2d at 506. Justice Rehnquist did, however, in the second major takings case decided last term, *First English Evangelical Church of Glendale v. County of Los Angeles*, *supra*, indicate that the finding of a compensable taking in that case may be avoided if the County "establish[es] that the denial of all use was insulated as a part of the State's authority to enact safety regulations,"¹² citing *Mugler v. Kansas*, *supra* and *Goldblatt v. Hempstead*, *supra*. 482 U.S. ____, 96 L.Ed.2d at 262. If the Florida Court was correct in finding a taking in the instant case, then the holding in *First English* implies that there is nothing Petitioner could have done to prevent exposed trees from continuing to spread canker in Florida. If the regulation of healthy but suspect trees is a taking, then a quarantine of exposed trees apparently would have been a temporary regulatory taking for which just compensation would have to be paid.

In the instant case, there has been no direct challenge to the validity of the emergency rules, the statutes under which they were adopted, or the provisions of the Florida Constitution placing such matters within the supervision of the Secretary of Agriculture. The Florida Court implicitly upheld the rules as a proper exercise of the police power and recognized their importance to health and safety objectives, but nonetheless found a taking.

12. The *First English* case did not directly present the question whether the flood regulation was, in fact, a taking but was decided on the assumption made by the California courts that the Complaint sought damages for an uncompensated temporary taking, for which California law provided no remedy. The court addressed only the remedial question. On remand, the California court will have the opportunity to determine whether "nuisance exception" applies to insulate the county from liability. See generally, Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J., 335, 345 (1988).

The writ should be granted in this case to clarify the legal rules applicable to takings claims arising from health and safety regulations. The principles announced in the long line of nuisance regulation cases cited above require that this type of regulation be accorded substantial deference, and that a taking requiring just compensation be found only where the State has acted arbitrarily and unreasonably.¹³ This type of analysis would require an initial finding that the regulation or legislation itself exceeds constitutionally permissible bounds and therefore is an invalid exercise of the police power.

The citrus canker regulation requiring eradication of exposed trees in this case was clearly a nuisance type regulation to which the "reciprocity of advantage" and not the balancing test of *Pennsylvania Coal* should be applied. The protection of common agricultural resources is a legitimate State purpose which justifies the destruction of property that is harmful to those resources. There can be no question that the citrus industry of Florida is a vital agricultural resource upon which the livelihood of many Florida citizens depends. See *Sligh v. Kirkwood*, *supra*, 237 U.S. at 60. The citrus industry of Florida had a right to expect the Department to eradicate citrus canker, which threatened all property and economic interests in citrus. Those interests extend far beyond individual nursery or grove owners to those involved in the harvesting, processing, shipping and marketing of citrus fruit and other citrus products, such as, for example, orange juice. The eradication of canker was designed to protect these vital interests. The Florida Court's substitution of its own judgment disrupts this most basic property protection afforded to all of these economic interests by the government's police power.¹⁴

13. These health and safety types of regulations must be distinguished from land use regulations which, although within the scope of the police power and fully coterminous with the police power, may become takings where the regulation "goes too far" and the interest of justice and fairness require the economic injuries caused by the regulation to be compensated by government. The nuisance exception, however, is not coterminous with the police power, but applies to a limited variety of regulations designed to prevent a property owner, by a noxious use, from injuring his neighbor or the community at large.

14. [Property rights] are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. *Mugler v. Kansas*, *supra*, 123 U.S. at 663.

The question will never be answered as to whether Respondents' citrus plants would have developed canker, primarily because the State obviated that potential by destroying the trees. Even Respondents' expert witness at trial admitted that he, as a member of the Citrus Canker Technical Advisory Committee, not only voted in favor of, but seconded, the motion to require destruction of trees received from infected nurseries and all citrus plants within 125 feet of such plants, at this committee's first meeting in September 1984. The committee, which was comprised of the best representatives of the academic and industrial sectors of Florida's agricultural community, made the recommendations to the State agricultural authority based on the best scientific information then available. The rules were clearly based on legitimate grounds, and were reasonably related to the public health crisis that they were designed to remedy. Since the justification for these rules cannot be debated, the question of compensation for a taking should never arise. The respondents had the misfortune of purchasing budwood from a canker infested nursery, but the State could not permit them to maintain these plant materials in light of the possibility that these plants would develop canker, and that the canker would spread to other citrus producing properties through wind, insect movement, irrigation, water runoff, or by people and equipment moving from grove to grove. Respondents, as well as all other economic interests in citrus production in Florida, have benefited from this type of regulation by being protected from unregulated spread of plant pests.

The Petitioner's decision to protect all of the unexposed citrus in Florida from exposed plants is comparable to the legislative choice in *Miller v. Schoene, supra*, to protect apple trees by destroying red cedar trees. It was an apparent impossibility to protect both classes of citrus trees (exposed and non-exposed) in this case, just as in *Miller v. Schoene*, it was impossible to allow red cedar trees to coexist with apple trees. Since the *unexposed* trees had a greater value to the public, the Petitioner had the authority to exercise its judgment to prefer the greater public resource over Respondents' individual property interests, even to the point of destruction.

For the reasons stated above, Petitioner submits that the decision below conflicts with *Mugler v. Kansas*, *Miller v. Schoene*, and *Keystone Bituminous Coal Association v. DeBenedictis* in that it finds the destruction of Respondents' trees to be a taking, fails to recognize the nuisance exception to the takings clause, and fails to directly address the validity of the regulation. The decision below also conflicts with *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907 (3rd Cir. 1987), in which the Court of Appeals, Third Circuit, held that officials of the Pennsylvania Department of Agriculture and USDA had not taken plaintiff's property for public use in adopting a quarantine regulation which prevented movement of poultry outside an area quarantined for avian influenza. The plaintiff could not move its poultry to its processing plant to be slaughtered, and was forced to sell its birds at a substantial loss. The court rejected the takings claim based on the rule of *Miller v. Schoene*, as reaffirmed in *Keystone Bituminous*, and suggested that the government could even have required destruction of the poultry without compensation. 816 F.2d at 915. See also, *Galloway Farms, Inc. v. United States*, 834 F.2d 998 (Fed. Cir. 1987) (1980 wheat embargo held not to be a taking).

The decision below also conflicts with numerous state court decisions, examples of which are: *Louisiana State Board of Agriculture and Immigration v. Tanzmann*, 140 La. 756, 73 So. 854 (1917) (destruction of citrus trees infected with citrus canker is not a taking); *Du Mond v. Walsh*, 189 Misc. 676, 72 N.Y.S.2d 642 (Sup. Ct. 1947) (quarantine of potatoes during golden nematode eradication program is not unconstitutional); *Durand v. Dyson*, 271 Ill. 382, 111 N.E. 143 (1916) (destruction of cattle exposed to hoof and mouth disease is not a taking); *Balch v. Glenn*, 85 Kan. 735, 119 P. 67 (1911) (destruction of orchard to eradicate San Jose scale is not a taking); *State v. Wacker*, 86 Ariz. 247, 344 P.2d 1004 (1959) (regulation requiring plowing under of crop remnants to eradicate pink bollworm is constitutional); *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S.E. 141 (1920) (destruction of red cedar trees to prevent cedar rust from infecting apple trees is not a taking); *State v. Main*, 69 Conn. 123,

37 A. 80 (1897) (destruction of peach trees infected with peach yellows not a taking); *Colvill v. Fox*, 51 Mont. 72, 149 P. 496 (1915) (destruction of apple trees infested with fruit scab not a taking); *Teresi v. State of California*, 180 Cal.App.3d 239, 225 Cal.Rptr. 517 (App. Ct. 1986) (destruction of bell peppers by chemical fumigation in Medfly eradication program is not a taking); *Wallace v. Feehan*, 206 Ind. 522, 190 N.E. 438 (1934) (destruction of growing crop of oats to eradicate European corn borer is not a taking); *Van Gunten v. Worthley*, 159 N.E. 326, 25 Ohio App. 496 (1927) (destruction of wheat crop to control European corn borer is not a taking); *Gray v. Thone*, 196 Iowa 532, 194 N.W. 961 (1923) (no taking in destruction of Japanese barberry bush as a noxious weed); *Los Angeles Berry Growers' Coop. Ass'n. v. Huntly*, 84 Wash. 155, 146 P. 373 (1915) (destruction of potatoes infected with tuber moth not a taking); *Carstens v. De Sellem*, 82 Wash. 643, 144 P. 934 (1914) (no taking in destruction of pear trees to control pear blight). *See also*, *Kent v. Polk County Board of Supervisors*, 391 N.W.2d 220 (Iowa 1986) (regulation prohibiting ownership of vicious animal not a taking).

CONCLUSION

It is, therefore, respectfully submitted that the petition for writ of certiorari should be granted to correct the apparent conflict between the decision below and the decisions of this Court, of federal Circuit Courts of Appeal and other State Courts of last resort cited herein.

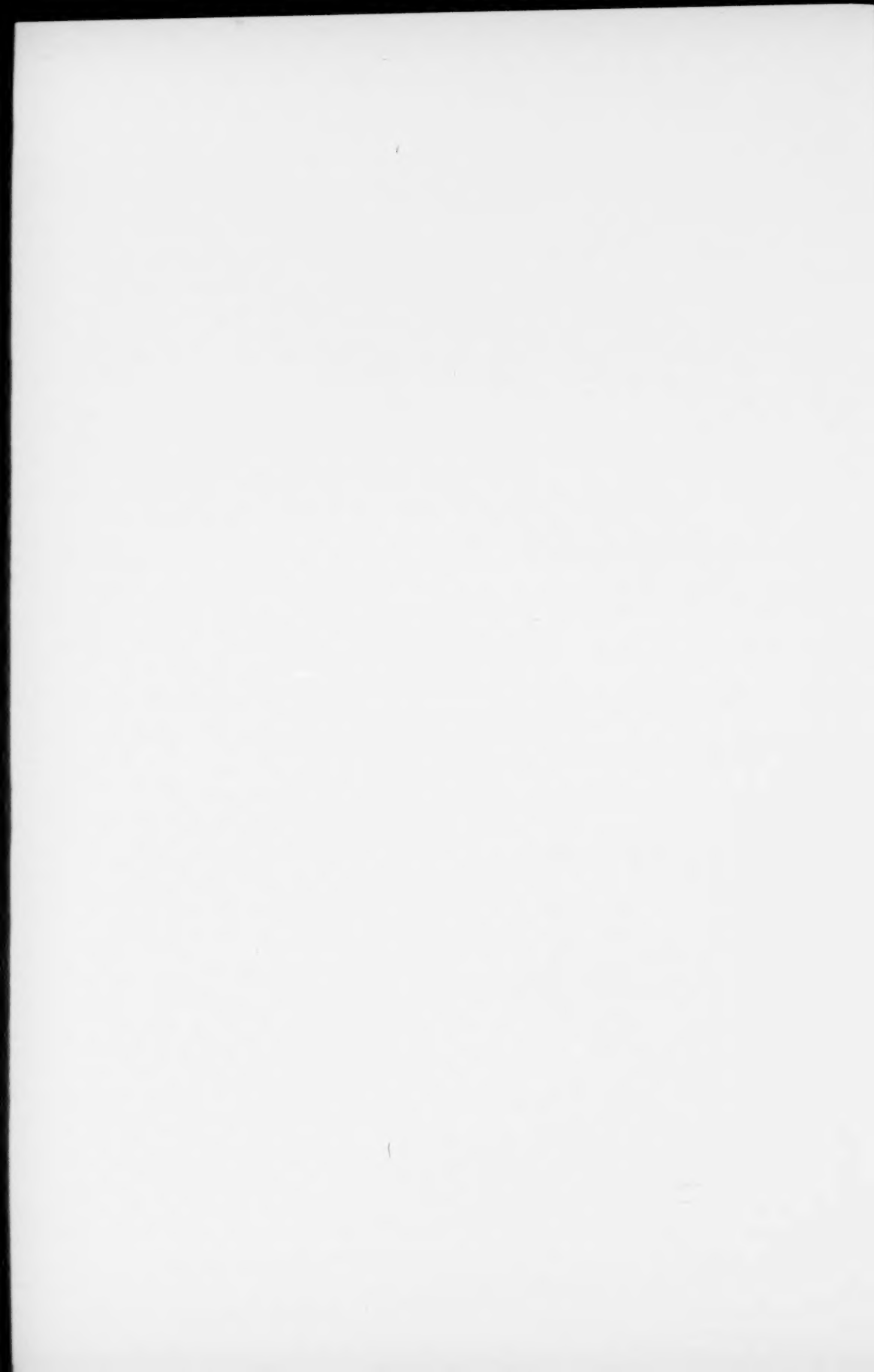
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APPENDIX



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Supreme Court of Florida

Thursday, January 21, 1988

CASE NO. 70,524

District Court of Appeal,
2d District — No. 86-2785

DEPARTMENT OF AGRICULTURE
and CONSUMER SERVICES,
Petitioner,

v.

MID-FLORIDA GROWERS, INC., et al.,
Respondents.

EHRlich, Justice.

We have for review *State of Florida, Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc. and Himrod & Himrod Citrus Nursery*, 505 So.2d 592 (Fla. 2d DCA 1987), in which the district court certified the following question as one of great public importance:

WHETHER THE STATE, PURSUANT TO ITS
POLICE POWER, HAS THE CONSTITUTIONAL
AUTHORITY TO DESTROY HEALTHY, BUT
SUSPECT CITRUS PLANTS WITHOUT
COMPENSATION?

Id. at 596. We have jurisdiction. Art. V, §3(b)(4), Fla. Const. We answer the certified question in the negative and approve the decision of the district court below.

During 1984, respondents, Mid-Florida Growers, Inc. and Himrod & Himrod Citrus Nursery, operated citrus nurseries in Hardee County, Florida. In April 1984, they purchased citrus budwood from Ward's Nursery in Polk County. Himrod purchased 8,000 budeyes; Mid-Florida received between 8,500 to 9,000. On August 27, 1984, a form of citrus canker was detected at Ward's Nursery. On September 6, 1984, the Florida Department of Agriculture and Consumer Services (Department) obtained samples from respondents' nurseries to determine whether their stock was infected, and informed respondents on September 10, 1984 that the tests did not establish that any of their stock was infected by or infested with citrus canker. Despite the negative

test results, the Department advised respondents on October 2, 1984, that their nursery stock must be burned and that quarantine was not an acceptable alternative. From October 7 to October 19, 1984, the Department burned 137,880 of Mid-Florida's and 143,594 of Himrod's trees and budwood. The emergency confirmatory orders designating respondents' nurseries as eradication areas and directing destruction of stock within 125 feet of budwood from Ward's Nursery were not issued until October 16, 1984.

Respondents filed an inverse condemnation suit seeking full and just compensation, contending that the Department's destruction of nursery stock which was not infected or diseased resulted in a taking for public purpose. The Department argued that the destruction occurred pursuant to regulatory and police power and did not constitute a taking. A trial was held on the liability issue alone. Although the trial judge noted that the Department's actions were within its police power, he found:

No competent evidence supports the states (sic) concern that the Plaintiffs' nursery stock was infected or diseased so as to justify destruction. The most that can be said for the Defendant is that the Plaintiffs' nursery stock was obtained from a single source where some form of citrus canker was detected. The Plaintiffs' careful methods of operation, and the fact that no citrus canker in any form was discovered in the Plaintiffs' nursery stock, leads us to the *legal* conclusion that no citrus canker was present. It is the responsibility of the state to make reasonable efforts to ascertain the presence of infection or disease, under the circumstances of this case. Therefore, a taking has occurred in this instance and Plaintiffs are entitled to full and just compensation.

(Emphasis in original).

The district court, on appeal, noted that a valid exercise of the police power does not preclude an inverse condemnation suit and that whether a valid exercise of the police power results in a taking must be decided on the facts of each case. 505 So.2d at 594. The district court also determined that the trial court's order in the instant case was clearly supported by substantial, competent evidence. Accordingly, the district court affirmed the trial court's determination that the nursery owners must be compensated and

held that “while the state validly exercised its police powers in destroying the citrus trees, a taking occurred when the healthy trees were destroyed.” *Id.* at 595.

The Department contends that no taking occurred in the instant case because the trees were destroyed in order to prevent a public harm. We, however, agree with the district court’s conclusion that destruction of the healthy trees benefited the entire citrus industry and, in turn, Florida’s economy, thereby conferring a public benefit rather than preventing a public harm. *Id.* at 595. Although this factor alone may not be conclusive, we have previously recognized that if a regulation creates a public benefit it is more likely that there is a taking. *See Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1381 (Fla.), *cert. denied sub nom. Taylor v. Graham*, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981). Furthermore, we reject the Department’s contention that the state’s lack of a possessory or proprietary interest in the destroyed property precludes a finding that a taking occurred. A taking of private property for a public purpose which requires compensation may consist of an entirely negative act, such as destruction. *See, e.g., Corneal v. State Plant Board*, 95 So.2d 1 (Fla. 1957) (destruction of healthy citrus trees required compensation). As noted by the United States Supreme Court:

In its primary meaning, the term ‘taken’ would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359-60, 89 L.Ed. 311 (1945) (footnote omitted).

The Department next urges that the certified question must be answered in the affirmative because the state, in destroying the trees, validly exercised its police power in conformance with applicable statutes and rules. Although we do not disagree with the Department’s contention that the state’s order was a valid

exercise of its police power, it is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking! See *Albrecht v. State*, 444 So.2d 8 (Fla. 1984). See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425, 102 S.Ct. 3164, 3170, 73 L.Ed.2d 868 (1982). As recently stated by the United States Supreme Court, a basic understanding of “the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.” *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, ____ U.S. ____, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987).

This principle is illustrated in *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959), a case involving circumstances similar to the present case.² In *State Plant Board*, a statute provided for destruction of uninfested trees in order to prevent the spread of a citrus disease known as spreading decline. This Court noted that when the state, in the exercise of its police power, destroys decayed fruit, unwholesome meats or diseased cattle, the constitutional requirement of “just compensation” clearly does not compel the state to reimburse the owner for the property destroyed because such property is valueless, incapable of any lawful use, and a source of public danger. The Court went on to conclude that “just

1. We, therefore, also reject the Department’s argument that the trial court, in determining the trees were healthy, ignored agency rules which defined the trees as being suspect and subject to destruction and thereby improperly allowed a challenge to the propriety of agency action in an inverse condemnation proceeding. Although the Department correctly contends that the propriety of an agency’s action may not be challenged in an inverse condemnation proceeding, section 253.763(2), Florida Statutes (1983), the fact that the action was authorized pursuant to agency rules does not, as noted above, preclude a determination that the action constituted a taking. A review of the record discloses that respondents were not permitted to challenge the propriety of the agency action. The pretrial stipulation provides that the disputed fact to be litigated is “whether under the circumstances present, the burning was a taking of property for which full and just compensation is due,” and a trial was held on the liability issue alone.
2. Petitioner’s argument that *State Plant Board v. Smith* is distinguishable from the present case because the legislature provided that just compensation was a requisite to the action of destruction in the act providing for destruction to eradicate spreading decline is not persuasive. Because Article X §6, Fla. Const. is self-executing, it is immaterial that there is no statute specifically authorizing recovery for loss. See *Jacksonville Expressway Authority v. Henry G. DuPree Co.*, 108 So.2d 289,294 (Fla. 1958). See also *First English Evangelical Lutheran Church*, 107 S.Ct. 2378, 2386 (In the event of a taking, the compensation remedy is required by the Constitution. Neither statutory recognition nor a promise to pay is necessary.)

compensation'' was a clear requisite, however, to the act of destroying healthy trees. *Id.* at 406-07. *See also Corneal*, 95 So.2d 1 (A healthy plant may not be destroyed in order to protect a neighbor's plant of the same species without compensation to the owner.) Accordingly, consistent with our decisions in *State Plant Board* and *Corneal*, we answer the certified question in the negative.

Finally, we reject the Department's claim that even if the certified question is answered in the negative, no compensation is required under the present circumstances because the trees that were destroyed had been in the presence of or exposed to canker infested nursery stock and were therefore not healthy. As the district court below correctly observed, "[w]hether regulatory action of a public body amounts to a taking must be determined from the facts of each case," 505 So.2d at 593, and the trial judge in an inverse condemnation suit is the trier of all issues, legal and factual, except for the question of what amount constitutes just compensation. *See United States v. Certain Parcels of Land in Monroe County*, 509 F.2d 801, 803 (5th Cir. 1975); *Pinellas County v. Brown*, 420 So.2d 308 (Fla. 2d DCA 1982), *petition for review denied*, 430 So.2d 450 (Fla. 1983). The trial court's determination of liability in an inverse condemnation suit is presumed correct and its findings will not be disturbed on appeal if supported by competent, substantial evidence. *See Atlantic International Investment Corp. v. State*, 478 So.2d 805, 808 (Fla. 1985); *Faison v. Division of Administration, Department of Transportation*, 299 So.2d 629, 630 (Fla. 1st DCA), *cert. denied*, 305 So.2d 201 (Fla. 1974); *Hardwick v. Metropolitan Dade County*, 256 So.2d 387, 390 (Fla. 3d DCA 1972).

A review of the record in the present case reveals substantial competent evidence was presented at trial on which the trial court based its finding that the trees were healthy. The nursery owners testified at trial that the trees from which the budeyes were removed did not have any visible signs of disease and that the Department had certified on the invoices from Ward's nursery that the nursery stock had been visually inspected for plant pests and met at least the minimum requirements of Chapter 581, Florida Statutes. Mr. Himrod testified that the leaves were removed from the twigs at the site where the wood was cut, the wood was trimmed and bundled, packed in ice, and transported to his nursery. Later, the wood was unpacked and placed on benches in the sunlight to dry. When dry, the individual eyes were cut off and grafted onto the

liners in the trees in the greenhouse. The sticks were then removed from the nursery and destroyed. He also testified that the tools used in the process were dipped in chlorine to prevent transmitting any virus diseases that may have been present. Mr. Lambert, from Mid-Florida, testified that his nursery followed a process very similar to that described by Mr. Himrod. Dr. Hannon testified as an expert witness for the respondents and stated that the process followed by respondents would diminish the number of living bacterial cells on the wood, if any, and reduce the chances of moving any bacteria with the budsticks. The Department's witness, Calvin Schoulties, conceded that the above steps could reduce the possibility of transmitting any disease that may have been present. Mr. Lambert stated that the budded plants had existed for five months before destruction in optimum conditions for development of bacteria, due to the heat, humidity, and density of the plants in the greenhouses, and that no citrus canker was detected. Dr. Hannon also testified that a nursery environment is more conducive to development of the disease.

The budehyes purchased by Himrod came from Block 7 of Ward's Nursery, a block in which no canker was detected but which lies within 125 feet of an infected block in three different directions. The majority of the budehyes purchased by Mid-Florida also came from Block 7, but some of the budehyes came from Block 106, which tested positive for canker. After the plants were budded, but before receiving notice of a quarantine, approximately 50,000 plants had been transferred out from the respondents' nurseries to customers. Under the Department's emergency rules, 137,800 of Mid-Florida's and 143,594 of Himrod's citrus trees were destroyed after being declared suspect. The 50,000 plants transferred out of the same greenhouses and sold to customers were not destroyed and no canker was ever discovered at these premises. These plants came from areas in the greenhouses which would have caused them to be destroyed if they had still been on the premises at the time the plants in respondents' nurseries were destroyed. We therefore agree with the district court below that the trial court's order in the instant case is clearly supported by substantial, competent evidence.

In conclusion, having answered the certified question in the negative we hold that full and just compensation is required when the state, pursuant to its police power, destroys healthy trees. Because a taking occurred in the instant case when the healthy trees were destroyed, the nursery owners must be compensated.

Accordingly, we approve the decision of the district court.

It is so ordered.

SHAW, BARKETT, GRIMES and KOGAN, J.J., concur.

McDONALD, C.J., dissents with an opinion.

OVERTON, J., recused.

McDONALD, Chief Justice, dissenting.

To justify a finding of inverse condemnation the majority makes a finding that the actions of the Department of Agriculture, in ordering the destruction of the plaintiffs' plants, conferred a public benefit. I totally disagree that this occurred. The department acted under the provisions of section 581.031(17), Florida Statutes (1985),* and its entire course of action was designed to prevent a public harm. The spread of citrus canker is a public harm; the department took steps to prevent the spread and thereby prevent a public harm. In the exercise of its police power, the department can take reasonable steps to avoid the spread of this disease which can, if not properly checked, literally wipe out the citrus industry. The plaintiffs claim that the destruction of its plants was unnecessary to prevent the harm and that as a result there was an unnecessary and unreasonable taking. They cannot show, however, where this action conferred a benefit to the public other than preventing harm; this is inadequate to support a finding of inverse condemnation.

The conduct of the department should be reviewed in the light of the perceived emergency confronting the department when the canker was found. In hindsight, it may be that the department overreacted and confiscated property not needed, but a review of the department's actions should not be made on hindsight.

* §581.031(17), Fla. Stat. (1985), grants the Department of Agriculture broad authority:

To supervise, or cause to be supervised, the treatment, cutting, and destruction of plants, plant parts, fruit, soil, containers, equipment, and other articles *capable of harboring* plant pests or noxious weeds, if they are infested or located within an area which may be suspected of being infested or infected due to its proximity to a known infestation, or if they came from a situation where they were *reasonably exposed to infestation*, when *necessary to prevent* or control the *dissemination of plant pests* or noxious weeds *or to eradicate same* and to make rules therefor. (Emphasis added.)

The department had the duty to take emergency measures to prevent an immediate harm — the spread of canker. In viewing its actions from an emergency standpoint, those actions were not unreasonable. The trial judge appeared to base his judgment of inverse condemnation solely on the basis that healthy trees were taken. The issue is not whether the plaintiffs' trees were actually healthy, but rather whether the government, acting responsibly, had reasons to conclude that they might not have been and that it was necessary to destroy them to prevent the spread of a deadly disease. Viewed in this light, the evidence fails to support a claim for inverse condemnation.

The district court of appeal recognized the state's order as a valid exercise of police power, but still approved the finding of inverse condemnation. This could be done only upon a finding that the department's orders and regulations enacted to combat the spread of canker, at the time they were made, were unnecessary or arbitrarily and capriciously applied. See *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1380-81 (Fla.), *cert. denied sub nom. Taylor v. Graham*, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981). The fact that healthy trees were confiscated does not supply that proof.

Inherent in the decision of *Nordmann v. Florida Department of Agriculture & Consumer Services*, 473 So.2d 278 (Fla. 5th DCA 1985), which cited *Denney v. Conner*, 462 So.2d 534 (Fla. 1st DCA 1985), whereby the regulations of the department authorizing the extinction of supposedly healthy plants in a canker emergency were approved, is the finding that no compensation is required. I would so construe and affirm that view. Hence I dissent.

SUPREME COURT OF FLORIDA

FRIDAY, APRIL 1, 1988

CASE NO. 70,524

District Court of Appeal

2d District - No. 86-2785

DEPARTMENT OF AGRICULTURE
and CONSUMER SERVICES,

Petitioner,

v.

MID-FLORIDA GROWERS, INC.,
et al.,

Respondents.

Upon consideration of the Motion for Rehearing filed in the above cause by attorneys for petitioner, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

EHRlich, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur

McDONALD, C.J., dissents

The Motion to Intervene filed by attorneys for Robert A. Butterworth, Attorney General, Motion to Strike Motion for Rehearing and Motion to Strike Attorney General's Motion to Intervene filed by attorneys for respondent, Motion to Enforce Automatic Stay or in the Alternative to Grant a Stay to Trial Court Proceedings filed by attorneys for petitioner, and Motion for Court to Consider Petitioner's Response to Respondent's Reply filed by attorneys for petitioner are hereby denied.

Respondent's Motion for Attorneys' Fees are granted; the amount to be determined by the trial court. See Fla. R. App. P. 9.400(b), 351 So.2d 981.

A True Copy

TEST

SID J. WHITE

Clerk Supreme Court

TC

cc: Hon. William A. Haddad, Clerk

Hon. Oliver L. Green, Jr., Judge

Hon. Coleman W. Best, Clerk

David C. G. Kerr, Esquire

Susan W. Fox, Esquire

Andrew K. McFarlane, Esquire

Harry Lewis Michaels, Esquire

Frank A. Graham, Jr., Esquire

M. Stephen Turner, Esquire

John M. Hogan, Esquire

Parker D. Thomson, Esquire

Sanford L. Bohrer, Esquire

Cloyce L. Mangas, Jr., Esquire

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

APRIL 10, 1987

Case No. 86-2785

STATE OF FLORIDA, DEPARTMENT
OF AGRICULTURE AND CONSUMER
SERVICES,

Appellant,

v.

MID-FLORIDA GROWERS, INC., and
HIMROD & HIMROD CITRUS NURSERY,
a partnership composed of
Joe Himrod and Joe B. Himrod,
Appellees.

RYDER, Acting Chief Judge.

We are here concerned with a complicated issue of law which appears to challenge the long-standing precept that the government, through its police power, may destroy or regulate property "to promote the health, morals and safety of the community" without compensating the property owner for the loss of use of the property or for a decrease in property value. The issue on this appeal is whether the state of Florida, pursuant to its police power, has the constitutional authority to destroy healthy, but "suspect" citrus plants without compensating nursery owners. The following facts are undisputed.

During 1984, appellees operated citrus nurseries in Hardee County, Florida. In April 1984, appellees obtained citrus budwood from Ward's Nursery, a citrus nursery in Polk County. On August 27, 1984, a form of citrus canker was discovered at Ward's Nursery. On September 6, 1984, the Department of Agriculture obtained samples from appellees' nurseries. On September 10, 1984, the Department informed appellees that the tests were negative: they did not establish that any stock was infected with citrus canker. Despite this fact, however, on October 2, 1984, appellees were advised that their nurseries had to be burned and that quarantine was not an acceptable alternative. On October 16, 1984, the

Department entered an emergency confirmatory order designating appellees' nurseries as eradication areas and directing destruction of their nursery stock from Ward's Nursery and all other stock within 125 feet thereof. From October 7 to October 19, 1984, the Department burned some 137,880 of Mid-Florida's and 143,594 of Himrod's citrus trees.

Appellees brought this action seeking full and just compensation based upon inverse condemnation for the destruction of citrus trees by the state as a result of its efforts to eradicate citrus canker. A trial was held on the liability issue alone. The trial judge held that a taking had occurred and ordered a jury trial as to damages. The trial judge stated:

This cause came on for trial on September 24, 1986, on the issue of liability only, and having weighed the evidence and considered the Pretrial Stipulation, the Court finds:

1. A police power circumstance existed to protect the economic public welfare, and Defendant's actions with respect to Plaintiffs' nursery stock were within its police power.
2. No competent evidence supports the states (sic) concern that the Plaintiffs' nursery stock was infected or diseased so as to justify destruction. The most that can be said for the Defendant is that the Plaintiffs' nursery stock was obtained from a single source where some form of citrus canker was detected. The Plaintiffs' careful methods of operation and the fact that no citrus canker in any form was discovered in the Plaintiffs' nursery stock, leads to the *legal* conclusion that no citrus canker was present. It is the responsibility of the state to make reasonable efforts to ascertain the presence of infection or disease, under the circumstances of this case. Therefore, a taking has occurred in this instance and Plaintiffs are entitled to full and just compensation. (Emphasis in original.)
3. Defendant knew that Plaintiffs were not authorizing full satisfaction of their claims and would accept any payment as partial only, and Defendant forewent any right to rely on its own condition of payment. Therefore,

Plaintiffs did not release their constitutional right to just compensation.

This appeal ensued.

Whether regulatory action of a public body amounts to a taking must be determined from the facts of each case. *Pinellas County v. Brown*, 450 So.2d 240, 242 (Fla. 2d DCA 1984); *Pinellas County v. Brown*, 420 So.2d 308, 309 (Fla. 2d DCA 1982). The trial court's determination of liability in an inverse condemnation suit is presumed correct and its findings will not be disturbed on appeal if supported by substantial, competent evidence. *Faison v. Division of Administration, Department of Transportation*, 299 So.2d 629 (Fla. 1st DCA 1974). The trial court's order in the instant case is clearly supported by substantial, competent evidence. Accordingly, we affirm.

Initially, we must draw attention to the difference between the power of eminent domain and the police power. Eminent domain is the sovereign power to take property for a public use or purpose. The sovereign must make just compensation for any property taken. Police power is the sovereign power to destroy or regulate the use of property to "promote the health, morals and safety of the community." The sovereign may exercise its police power without making just compensation for the property taken. *Adams v. Housing Authority of City of Daytona Beach*, 60 So.2d 663 (Fla. 1952).

A valid exercise of the police power does not preclude an inverse condemnation suit. "It is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking." *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1984).

It is difficult to determine when the valid exercise of police power stops and an impermissible encroachment on private property rights begins. No settled formula exists. Whether a valid exercise of the police power results in a taking must be decided on the facts of each case. The Florida Supreme Court has compiled the following list of factors which have been used in analyzing takings in the past:

1. Whether there is a physical invasion of the property.

2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
3. Whether the regulation confers a public benefit or prevents a public harm.
4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
5. Whether the regulation is arbitrarily and capriciously applied.
6. The extent to which the regulation curtails investment-backed expectations.

Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1380-81 (Fla. 1981). The Florida Supreme Court further stated: "If the regulation is arbitrarily and capriciously applied it is an invalid exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power." *Id.* at 1381. The court then stated, "[i]t may be, however, that a regulation complies with standards required for the police power but still results in a taking," citing as authority *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158 (1922). The court construed *Pennsylvania Coal Co.* as follows:

In *Pennsylvania Coal Co.* the Court considered a Pennsylvania statute, passed to protect the public safety, which prohibited subsurface mining of coal if such mining would cause subsidence of the surface. The Court held that enforcement of the statute amounted to a taking which required compensation. In holding that the mining prohibition was unconstitutional as applied, the court emphasized that the statute rendered the coal company's rights to subsurface minerals virtually worthless.

Graham, 399 So.2d at 1381.

Similarly, the United States Supreme Court has stated that whether a taking has occurred can only be determined on a case-by-case basis:

While this court has recognized that the "Fifth Amendment's guarantee . . . is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 1104 (1958); see *United States v. Caltex, Inc.*, 344 U.S. 149, 156, 73 S.Ct. 200, 203 (1952).

Penn Central Transportation Co. v. City of New York, 438 U.S. 103, 98 S.Ct. 2646 (1978).

Both the First and Fifth District Courts of Appeal have held constitutional the state's exercise of its police power in ordering the destruction of healthy but suspect trees. *Denney v. Conner*, 462 So.2d 534 (Fla. 1st DCA 1985); *Nordmann v. Florida Department of Agriculture and Consumer Services*, 473 So.2d 278 (Fla. 5th DCA 1985). Neither court reached the compensation issue. In *Denney*, the court stated:

At this time, we do not attempt to determine whether appellants' trees are in fact healthy or diseased. Nor do we address the issue of compensation. We hold only that the immediate final order and the rules under which it was promulgated adequately show that the threat of spreading citrus canker is of sufficient imminence and scope to justify the emergency order entered by the department.

Denney, 462 So.2d at 537. The fifth district in *Nordmann* followed the first district's *Denney* decision and rationale.

We join our sister courts in holding that the state's order was a valid exercise of its police power. Unlike our colleagues, however, we must go one step further and determine whether the valid exercise of the police power resulted in a taking. We conclude that it did.

When the state, in the exercise of its police power, destroys diseased cattle, decayed fruit or diseased trees, the constitutional requirement of "just compensation" clearly does not compel the state to reimburse the owner for the property destroyed. Such property is incapable of any lawful use, it is valueless, and it is a source of public danger. "A legislative provision for compensation in such cases is a mere bounty." *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959).

Different is the situation, however, where healthy cattle, fruit or trees are destroyed to protect public health, safety or welfare. While the general principle is that no compensation is required when there is a valid exercise of the police power, the general principle is not without exception. Whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances in that case." *Penn; Smith*.

Citrus canker is a virulent disease which first appeared in Florida in 1914. At that time, drastic measures were taken to eradicate the state of the disease. The measures included destruction of many citrus trees. Florida was declared free of the disease in 1927.

Citrus canker reappeared in Florida in August of 1984. The Florida Department of Agriculture took immediate steps to eradicate the disease before the infected area spread and resulted in economic disaster for Florida's citrus industry. The Department of Agriculture, acting pursuant to the broad powers given it in Article IV, Section 4 of the Florida Constitution and sections 570.07(21) and 581.031(7), Florida Statutes (1983), began ordering destruction of citrus trees found to be diseased or to be suspect.

Appellees had the misfortune of having innocently bought a few hundred budsticks from Ward's Nursery, which was subsequently declared to be infested with canker. The state examined and tested appellees' trees. The tests proved negative. Yet, the state ordered the destruction of appellees' healthy trees.

We hold that while the state validly exercised its police powers in destroying the citrus trees, a taking occurred when the healthy trees were destroyed. The nursery owners must be compensated. We understand the difficulties the state faces in confronting citrus canker. Canker, unlike spreading decline, is a particularly resilient disease which may be spread by both natural and artificial means and which may lay dormant in healthy plants for some months before manifesting signs of the disease. We understand the difficulties in determining whether canker is present in healthy trees. Destruction of the healthy trees, however, assured the continued vitality of Florida's most valuable citrus industry. Because destruction of the healthy trees benefitted the entire citrus industry and, in turn, Florida's economy, the cost is more properly spread among the many rather than the few who were unfortunate enough to have purchased budsticks from the infected nursery. As the United States Supreme Court stated in *Penn Central*, citing to *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960), "the Fifth Amendment's guarantee . . . is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 2659.

While we feel our disposition is correct, because this case involves such an important area of the law and because this malady is likely to revisit us, we certify the following question to the Florida Supreme Court as one of great public importance:

WHETHER THE STATE, PURSUANT TO ITS
POLICE POWER, HAS THE CONSTITUTIONAL
AUTHORITY TO DESTROY HEALTHY, BUT
SUSPECT CITRUS PLANTS WITHOUT
COMPENSATION?

Affirmed.

CAMPBELL and LEHAN, JJ., Concur.

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT
IN AND FOR HARDEE COUNTY, FLORIDA
(October 10, 1986)
CASE NO. CA-G-85-275

MID-FLORIDA GROWERS, INC. and
HIMROD & HIMROD CITRUS NURSERY,
a Partnership composed of Joe Himrod
and Joe B. Himrod,
Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT
OF AGRICULTURE AND CONSUMER
SERVICES,
Defendant.

ORDER OF LIABILITY FOR TAKING

This cause came on for trial on September 24, 1986, on the issue of liability only, and having weighed the evidence and considered the Pretrial Stipulation, the Court finds:

1. A police power circumstance existed to protect the economic public welfare, and Defendant's actions with respect to Plaintiffs' nursery stock were within its police power.

2. No competent evidence supports the states concern that the Plaintiffs' nursery stock was infected or diseased so as to justify destruction. The most that can be said for the Defendant is that the Plaintiffs' nursery stock was obtained from a single source where some form of citrus canker was detected. The Plaintiffs' careful methods of operation, and the fact that no citrus canker in any form was discovered in the Plaintiffs' nursery stock, leads to the *legal* conclusion that no citrus canker was present. It is the responsibility of the state to make reasonable efforts to ascertain the presence of infection or disease, under the circumstances of this case. Therefore, a taking has occurred in this instance and Plaintiffs are entitled to full and just compensation.

3. Defendant knew that Plaintiffs were not authorizing full satisfaction of their claims and would accept any payment as partial only, and Defendant forewent any right to rely on its own

condition of payment. Therefore, Plaintiffs did not release their constitutional rights to just compensation.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs are entitled to a judgment of liability against the Defendant for inverse condemnation, and this cause shall proceed to jury trial on the issue of damages upon notice duly given.

DONE AND ORDERED this 10 day of October, 1986.

OLIVER L. GREEN, JR.
Circuit Judge

Copies furnished:

M. Stephen Turner, Esq.
Robert Chastain, Esq.
Frank A. Graham, Esq.
Harry Lewis Michaels, Esq.

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any

State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF FLORIDA

ARTICLE IV

SECTION 4. Cabinet. —

(a) There shall be a cabinet composed of a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education. In addition to the powers and duties specified herein, they shall exercise such powers and perform such duties as may be prescribed by law.

(b) The secretary of state shall keep the records of the official acts of the legislative and executive departments.

(c) The attorney general shall be the chief state legal officer. There is created in the office of the attorney general the position of statewide prosecutor. The statewide prosecutor shall have concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws occurring or having occurred, in two or more judicial circuits as provided by general law. The statewide prosecutor shall be appointed by the attorney general from not less than three persons nominated by the judicial nominating

commission for the supreme court, or as otherwise provided by general law.

(d) The comptroller shall serve as the chief fiscal officer of the state, and shall settle and approve accounts against the state.

(e) The treasurer shall keep all state funds and securities. He shall disburse state funds only upon the order of the comptroller. Such order may be in any form and may require the disbursement of state funds by electronic means or by means of a magnetic tape or any other transfer medium.

(f) The commissioner of agriculture shall have supervision of matters pertaining to agriculture except as otherwise provided by law.

(g) The commissioner of education shall supervise the public education system in the manner prescribed by law.

CONSTITUTION OF THE STATE OF FLORIDA

ARTICLE X

SECTION 6. Eminent domain. —

(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

FLORIDA STATUTES (1983)

570.07 Department of Agriculture and Consumer Services; functions, powers, and duties.—The department shall have and exercise the following functions, powers, and duties:

(1) Inquire into the needs of agriculture of the state, and make appropriate recommendations to the Governor and the Legislature, except as to such functions as are specifically assigned under state law to other state agencies.

(2) Perform all regulatory and inspection services relating to agriculture except agricultural education, demonstration, research, and those regulatory functions relating primarily to the protection of the public health or assigned by law to other state agencies.

(3) Make investigations, conduct hearings, and make recommendations concerning all matters relating to the powers, duties, and functions of the department as provided by law.

(4) Cooperate with the United States Department of Agriculture in obtaining and disseminating production statistics, market and trade information concerning demand, supply, prevailing prices, and commercial movements of agricultural products and extent of products in storage, and cooperate with any other state or federal agencies which in any manner may be helpful to agriculture. It may compile, publish and disseminate information and pertinent data on crops, livestock, poultry, and agricultural products and may provide matching funds with other agencies, local, state, or national for the conduct of such service.

(5) Annually fix such inspection and license fees and recording and service charges within maximum limits provided by law as may be necessary to pay the cost of the service performed, maintenance of reasonable reserves for contingencies, including cost of depository, accounting, disbursement, auditing, rental of quarters and facilities furnished by the state, and payment of compensation to fruit and vegetable inspectors for overtime work, for which industry has been billed, in excess of 40 hours per week at the same rate of pay as received for normal work hours, in those cases where conditions do not permit reimbursement for overtime work by giving compensatory time.

(6) Foster and encourage the standardizing, grading, inspection, labeling, handling, storage, and marketing of agricultural products. And, after investigation and public hearings thereon, acting in cooperation with the United States Department of Agriculture, to establish and promulgate standard grades and other standard classifications of and for agricultural products.

(7) Extend in every practicable way the distribution and sale of Florida agricultural products throughout the markets of the world.

(8) Promote, in the interest of the producer, the distributor, and the consumer, the economical and efficient distribution of agricultural products of this state; and to that end cooperate with the Department of Commerce of the United States and any other department or agency of the federal or state government.

(9) Obtain and furnish information relating to the selection of shipping routes, adoption of shipping methods, avoidance of delays in the transportation of agricultural products, or helpful in the solution of other transportation problems connected with the distribution of agricultural products.

(10) Act as adviser to producers and distributors, when requested and to assist them in the economical and efficient distribution of their agricultural products as well as to assist and encourage cooperative effort among producers to gain economical and efficient production of agricultural products.

(11) Foster and encourage cooperation between producers and distributors in the interest of the general public.

(12) Act as a mediator or arbitrator in any controversy or issue that may arise between producers and distributors of any agricultural products concerning the grade or classification of such products.

(13) Protect the agricultural and horticultural interests of the state, and to that end it shall enforce those functions, powers, and duties given to it in chapter 581, and all other laws relating thereto.

(14) Inspect apiaries for diseases inimical to bees and beekeeping and enforce the laws relating thereto.

(15) Protect the livestock interests of the state, and to that end it shall enforce those functions, powers, and duties given to it in chapter 585, and all other laws relating thereto.

(16) Enforce the state laws and regulations relating to: fruit and vegetable inspection and grading; spray, residue inspection, and removal; registration, labeling, inspection and analysis of commercial stock feeds and commercial fertilizers; classification, inspection, and sale of poultry and eggs; registration, inspection and analysis of gasolines and oils; registration, labeling, inspection, and analysis of pesticides; registration, labeling, inspection, germination testing and sale of seeds, both common and certified; weights, measures, and standards; foods, as set forth in the Food, Drug and Cosmetic Law; inspection and certification of honey; sale of liquid fuels; the licensing of dealers in agricultural products; administration and enforcement of all regulatory legislation applying to milk and milk products, ice cream and frozen desserts; recordation and inspection of marks and brands of livestock; and all other regulatory laws relating to agriculture.

(17) Receive and compile reports on all fruits, vegetables, and other farm products as are grown in the state, to publish same in the state press that will do so without cost; to obtain and disseminate information as to carriers' rates, to collect information as to additional market centers and their capacity, and to keep and compile a statement of all shipments moving out of the state, that through this information the farmers and producers can be kept posted as to exact conditions existing in the state, and the several markets of the country, to better cooperate with and prevent a loss to our people, and to cooperate with the United States Government in establishing and maintaining a market news system; to issue such bulletins or other information along lines of advice as to how best pick, pack, kind of package, and way to distribute; to study all conditions as affecting other states; to keep in touch with the Department of Agriculture at Washington, D. C., that through this close touch and study of conditions, it can advise our people what crops to plant or not plant, what markets are overstocked, and through a system of cooperation aid in development of agricultural interests and protection of Florida's producers; to devise such methods as will best carry forward this work, such as inspection of packages and other measures as conform to plans of the marketing system of the Department of Agriculture at Washington; to publish or issue bulletins listing for sale, exchange, and wanted items for farmers; to do all that

can be done to bring relief to and aid in the marketing and distribution of Florida's products.

(18) Instruct in the standardization, grading, packing, processing, loading, refrigeration, routing, diversion, and distribution of farm products; to carry on research work or cooperate with other state or federal agricultural agencies on research work in marketing and to provide any other information and assistance necessary to the efficient selling of farm products; to acquire suitable sites and erect thereon necessary marketing facilities, livestock pens and properly equip, maintain, and operate same for the handling of all staple field crops, meats, fruits and vegetables, poultry and dairy products, and all farm and home products, and for selling and loading livestock, and to let or lease space therein and thereon; to store, or refrigerate any meats, vegetables, fruits, poultry or dairy products; to employ such managers and other help as may be necessary to operate the plants and pens and market the products handled, and make such charges for such services as will cover the costs of operation and maintenance.

(19) Protect the dairy interests of the state, and to that end it shall enforce these functions, powers, and duties given to it in chapters 502 and 503.

(20) Stimulate, encourage, and foster the production and consumption of agricultural products; conduct activities that may foster a better understanding and more efficient cooperation among producers, dealers, buyers, food editors, and the consuming public in the promotion and marketing of Florida agricultural products; sponsor trade breakfasts, luncheons, and dinners and distribute promotional materials and favors in connection with meetings, conferences, and conventions of dealers, buyers, food editors, and merchandising executives that will assist in the promotion and marketing of Florida agricultural products to the consuming public.

(21) To declare an emergency when such exists, as defined in chapters 581 and 585, and make, adopt, and promulgate rules and regulations which would be effective during the term of such emergency.

(22) Hold hearings, administer oaths, subpoena witnesses and take testimony in all matters relating to the exercise and

performance of the powers and duties of the department. Upon failure or refusal of any witness to obey any subpoena, the department may petition the circuit court having jurisdiction in the county within which the seat of government is located, and upon proper showing, the court shall enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the order of the court shall be punishable as a contempt of court.

(23) Enact, amend, and repeal necessary administrative rules.

(24) In its discretion, adopt and promulgate rules pertaining to the inspection of quality, the truthful and honest branding of each package shipped, and the prohibiting of any shipper having the benefit of shipping through the facilities of the department who does not strictly observe and obey such rules in the preparation, packing, and shipping of his agricultural products.

(25) With the approval of a majority of the Board of Trustees of the Internal Improvement Trust Fund, the department may sell, exchange, convey, or otherwise dispose of any real property owned or held by it when, in its judgment, such property is not needed for the purpose for which the said property was held and cannot be put to any other beneficial use by the department. A deed to any real property owned or held by the department, duly executed by the department and witnessed by a majority of the board of trustees, shall be sufficient to convey all the right, title and interest of the said department or of the state in and to the property described therein.

(26) Sell, exchange, convey or otherwise dispose of any personal property and lease any real property owned or held by the department when in its judgment, such property is not needed for the purpose for which the said property was held and cannot be put to any other beneficial use by the department.

(27) Incur expenses for membership dues in the national and southern associations of state departments of agriculture and other organizations affiliated with agriculture and for presentment of plaques and framed certificates for outstanding service.

(28) For pollution control purposes, regulate open burning connected with rural land-clearing, agricultural, or forestry operations, except as to fires for cold or frost protection.

(29) Advance funds monthly to career service employees whose duties require the purchase of official state samples for state examination, to be used for the purchase of such samples. Each monthly advance shall be in an amount equal to one-twelfth of the actual expenses paid the position for such samples in the previous fiscal year, or in the case of new positions, one twelfth of the expenses paid for samples of a similar classification in the previous fiscal year; however, in the event of unusual circumstances, such advances may be increased for a period not to exceed 60 days. Such advances shall be granted to each such career service employee as long as the employee remains in a position which requires the purchase of samples and is employed by the department and shall be granted only to career service employees who have executed a proper power of attorney with the department to insure the proper collection of such advances in case it may become necessary.

FLORIDA STATUTES (1983)

581.031 Department; powers and duties.—The department shall have the following powers and duties:

(1) To make all rules governing nurseries and the movement of nursery stock therein as may be necessary in the eradication, control, or prevention of the dissemination of plant pests or noxious weeds.

(2) To make and publish standard grades for nursery stock.

(3) To make rules governing the grading, marking, sale, and distribution of nursery stock by nurserymen, stock dealers, agents, and plant brokers.

(4) To provide rules under which nursery stock may be brought into this state from other states, territories, and foreign countries.

(5) To make such rules with reference to plants and plant products while in transit through this state as may be deemed necessary to prevent the introduction into and dissemination within this state of plant pests and noxious weeds.

(6) To declare a plant pest or noxious weed to be a nuisance as well as any plant or other thing infested or infected therewith or that has been exposed to infestation or infection and therefore likely to communicate same.

(7) To declare a quarantine against any area, place, nursery, grove, orchard, county, or counties within this state, other states, territories, foreign countries or portion thereof in reference to plant pests or noxious weeds and prohibit the movement within this state from other states, territories, or foreign countries of all plants, plant products, or other things from such quarantined places or areas which are likely to carry such plant pests or noxious weeds if such quarantine is determined, after due investigation, to be necessary in order to protect the agricultural and horticultural interests of this state. In such cases, the quarantine may be made absolute or rules may be adopted prescribing the method and manner under which the prohibited articles may be moved into or within, sold, or otherwise disposed of in this state.

(8) To make and publish reasonable rules governing the application for, and issuance, suspension, and revocation of, certificates of registration and of inspection.

(9) To enter into cooperative arrangements with any person, municipality, county, and other department of this state and boards, officers, and authorities of other states and the United States for inspection with reference to plant pests and noxious weeds for the control and eradication thereof and contribute a just proportionate share of the expenses incurred under such arrangements.

(10) To publish at regular intervals, to be determined by it, an official organ of the department for public distribution. It may from time to time publish and distribute to the public such further information as may be deemed necessary.

(11) To suspend or revoke certificates of inspection and of registration of nurserymen, stock dealers, agents, and plant brokers in the state.

(12) To purchase all necessary materials, supplies, office and field equipment, and other things and make such other expenditures as may be essential and necessary in carrying out the provisions of this chapter within the limits of the amount appropriated by law.

(13) To enforce the provisions of this chapter by writ of injunction in the proper court as well as by criminal proceedings.

(14) To test nursery stock to determine freedom from specific diseases and to register such stock. Nursery stock found free of the diseases for which it was tested may be propagated by the department, if authorized by the owner, and reproductive parts distributed in limited quantities to qualified persons for further propagation under procedures prescribed by the department when recommended by the industry concerned. The department may prescribe standards and procedures for the propagation and distribution of new or superior strains of plants when not provided for by other agencies and upon recommendation of the industry concerned. The department may prescribe a fee for such services, provided the fee shall not exceed the cost of the services rendered, and may sell at a reasonable price any plant or plant part that may result from the propagation of tested plants as sources of propagating material for distribution to the industry. Also, the department may sell in the best interest of the state any fruit produced incidental to such propagation.

(15) To inspect, or cause to be inspected by duly authorized representatives, plants, plant products, or other things and substances that may, in its opinion, be capable of disseminating or carrying plant pests or noxious weeds, and for this purpose shall have power to enter into or upon any place and to open any bundle, package, or other container containing, or thought to contain, plants or plant products or other things capable of disseminating or carrying plant pests or noxious weeds.

(16) To carry on investigations of methods of control, eradication, and prevention of dissemination of plant pests or noxious weeds.

(17) To supervise, or cause to be supervised, the treatment, cutting, and destruction of plants, plant parts, fruit, soil, containers, equipment, and other articles capable of harboring plant pests or noxious weeds, if they are infested or located in an area which may be suspected of being infested or infected due to its proximity to a known infestation, or if they came from a situation where they were reasonably exposed to infestation, when necessary to prevent or control the dissemination of plant pests or noxious weeds or to eradicate same and to make rules therefor.

(18) To inspect, or cause to be inspected, all nurseries in the state at such intervals as it may deem best and to keep a complete, accurate, and current list of all certified nurseries to include:

- (a) Name of nursery.
- (b) Name of the nursery's owner.
- (c) Mailing address of nursery.
- (d) Location of nursery.
- (e) Type of crop grown.
- (f) Size of acreage of nursery.
- (g) Type of stock dealer or plant broker.

(19) To demand of any person who has in his possession or under his control plants or plant products or other things likely to carry plant pests or noxious weeds full information as to the origin and source of same; and it shall be a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, for such person to refuse to give the information demanded, if able to do so.

(20) To intercept and inspect or cause to be inspected, while in transit or after arrival at destination, all plants, plant products, or other things likely to carry plant pests or noxious weeds being moved into this state from another state, territory, or foreign country; and, if, upon inspection, the same be found to be infested or infected with a plant pest or noxious weed or if such material is believed to be likely to communicate or transmit same or is being or has been transported in violation of any of the rules of the department, then said plants, plant products, or other things may be treated when necessary and released, returned to the sender, or destroyed.

(21) To make and issue certificates of registration and of inspection to nurserymen, stock dealers, agents, and plant brokers, after proper certification of their nursery stock, authorizing them to do business as nurserymen, stock dealers, agents, or plant brokers within the state.

(22) To collect or accept from other agencies or individuals specimens of arthropods, nematodes, fungi, bacteria, parasitic plants, or other organisms for positive identification, and to provide suitable space for their storage and maintenance. The department arthropod collection will be known as the "Florida State Collection of Arthropods."

(23) To provide, when requested by farmers, growers, or other interested parties, special inspections, special certifications, special investigations, or other plant regulatory activities not otherwise

specifically provided for in these statutes; and as authorized, to prescribe the fee for such services, provided that the fee shall not exceed the cost of the service rendered, including the salaries and expenses of the personnel involved.

(24) To prescribe the duties of assistants, authorized representatives, inspectors, and other employees as may be required and delegate to such assistants, authorized representatives, inspectors, and other employees such powers and authority as may be deemed proper within the limits of the powers and authority conferred upon the said director by this chapter.

(25) To enter into cooperative arrangements with any person, firm, agency, company, or other entity for the production and distribution of organisms, pesticides, chemical compounds, or other methods of control investigated, discovered, or developed by, or with the assistance of, the department through the Division of Plant Industry and to accept a royalty or other remuneration for its services or contributions, any proceeds from which shall be deposited in the Nursery Inspection Fee Fund.

5BER84-8 Citrus Canker Rule and Quarantine

(l) Definitions. For the purpose of this rule chapter, the definitions in Section 581.011, Florida Statutes, and the following definitions shall apply:

(a) Department. State of Florida Department of Agriculture and Consumer Services.

(b) Division. Division of Plant Industry, State of Florida Department of Agriculture and Consumer Services.

(c) Certificate. An official document stipulating compliance with the requirements of the department or the United States Department of Agriculture.

(d) Citrus. All members of the subfamily Aurantioideae, of the family Rutaceae according to Swingle and Reese, including any parts thereof.

(e) Citrus canker disease. A bacterial disease incited by *Xanthomonas campestris* pv. *citri* causing damage to leaves, shoots, and fruit of susceptible plants in the Rutaceae family.

(f) Common carrier. An individual or corporation licensed to transport persons, goods, or messages for compensation.

(g) Host plant. A plant or part thereof known or suspected to be capable of harboring or transporting citrus canker in any of its stages.

(h) Infected or infested. Actually harboring citrus canker, or so exposed to any stages of development of the citrus canker that it is reasonable to believe an infection or infestation could exist.

(i) International movement. Movement into Florida from a country outside the United States or movement from Florida to a country outside the United States.

(j) Interstate movement. Movement from Florida to another state or from another state to Florida.

(k) Intrastate movement. Movement from any part of the State of Florida to another part of Florida.

(l) Regulated area. Any state or portion thereof including Florida and any county, precinct, city and other minor civil division designated by order of the department, the USDA, or the affected state as an area regulated due to the presence of citrus canker.

(m) Regulated articles. Any article, including soil, capable of transporting or harboring citrus canker.

(n) Shipment or shipments. The act or process of transferring or moving products from one point to another, or the products being transferred or moved.

(o) Treatment or eradication area. An area where it has been determined that citrus canker exists or is believed to exist or is located in such proximity to an infection or infestation of the disease that destruction of infected or infested material or treatments must be made to eliminate the disease.

(p) USDA. United States Department of Agriculture, Animal and Plant Health Inspection Service (APHIS).

(2) Purpose of rule chapter. The purpose of this rule chapter is to prevent the spread of citrus canker within the State of Florida, and introduction of that disease into Florida from foreign and domestic sources. This rule is promulgated to provide a quarantine on any regulated area, and to specify conditions under which regulated articles may be certified as free of citrus canker when moved from the regulated area to a nonregulated area. This rule also provides for the treatment and eradication of citrus canker in all designated regulated areas within the State of Florida.

(3) Quarantined area.

(a) All countries, territories, states, counties, cities, farms, nurseries, urban properties, packinghouses, florists, or portions thereof, found to be infected or infested with citrus canker, or so located that it is reasonable to assume that infection or infestation is likely to have occurred, shall be considered regulated areas.

(b) That portion of Polk County lying within the following described areas: NE $\frac{1}{4}$ of SE $\frac{1}{4}$; S $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$; S $\frac{1}{4}$ of N $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$; SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of SW

$\frac{1}{4}$ of NE $\frac{1}{4}$; E $\frac{1}{4}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$; NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$; N $\frac{1}{4}$ of N $\frac{1}{2}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ Section 25, Township 32S, Range 28E. SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$; W $\frac{1}{4}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$; W $\frac{1}{4}$ of W $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$; NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$; N $\frac{1}{4}$ of N $\frac{1}{2}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ Section 25, Township 32S, Range 28E. SW $\frac{1}{4}$ of Sw $\frac{1}{4}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$; W $\frac{1}{4}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$; W $\frac{1}{4}$ of W $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$; NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 30, Township 32S, Range 29 E are quarantined. This area may be extended to include any additional infected or infested areas or any areas considered to be or have been subjected to infection or infestation by oral order to be followed by written notice to property owner. Notice may be given by publication in a local newspaper of general circulation when affected privately-owned properties are too numerous to practically contact each owner.

(4) Regulated articles.

(a) Plants and plant parts including fruit and seeds of any of the following species:

1. *Poncirus trifoliata* (trifoliata orange)
2. *Fortunella margarita* (kumquat)
3. *Citrus* spp. (all) (lemon, lime, pummelo, grapefruit, orange, mandarin, tangerine, satsuma, etc.)

(b) Pulp and peel resulting from the processing of citrus fruit.

(c) Trucks, tractors and any other equipment used in the production, cultivation, harvesting, and transportation of host plants.

(d) Hand and garden tools and nursery equipment used on the property where host plants are grown.

(e) Any other products, articles, or means of conveyance, of any character whatsoever, when it is determined by an inspector that they present a hazard of spread of citrus canker, and the person in possession thereof has been so notified.

(5) Procedure for establishing a regulated area. Based upon investigation and findings by the department that an immediate danger to the public health, safety or welfare exists, the department, through an authorized representative, may by oral order, designate as a regulated area any county, precinct, city, political subdivision or any minor civil division thereof, in which citrus canker has been determined to exist or in which it is deemed necessary to regulate because of proximity to an infected or infested area of citrus canker, or its inseparability for quarantine enforcement purposes from an infected or infested area. Such oral order shall become a final order when issued in writing by the department to the governing body or its representative of each affected county, precinct, city, political subdivision, or any minor civil division thereof, or the owner or his representative of privately-owned property. A regulated area may be designated by legal notice published in a local newspaper of general circulation when affected privately-owned properties are too numerous to practically contact each owner or when such areas are only a portion of a political subdivision.

(6) Certification of regulated articles. Certification of regulated articles may be based on treatment by an approved method of the USDA-APHIS. The certificate of treatment shall include the method of treatment, and other pertinent data regarding treatment as listed in the USDA-APHIS Manual. All treatments must be in accordance with the Environmental Protection Agency and Occupational Safety and Health Agency guidelines.

(7) Movement of regulated articles.

(a) International movement of regulated articles: All regulated articles moving from Florida to other countries or territories outside the United States must comply with USDA Quarantine requirements.

(b) Interstate movement of regulated articles: All regulated articles moving from Florida to other states of the United States must comply with USDA Quarantine requirements.

(c) Intrastate movement of regulated articles:

1. All regulated articles are prohibited from movement within the State of Florida unless accompanied by a limited permit or a valid certificate issued by the USDA or the department.

2. Regulated articles may move from a regulated area through or to a nonregulated area where such articles are moved in a manner prescribed by the USDA or the department that precludes the possible spread of citrus canker, and accompanied by a limited permit or a valid certificate.

(8) Entry of authorized representative upon properties. All owners and occupants of properties on which citrus canker is known to exist or is suspected to exist are hereby ordered and required to permit entry of department representatives upon said properties for purposes of inspecting, taking of specimens, and applying or supervising treatments to the soil, plants, or any other articles designated by the department when deemed necessary. This may include destruction of plants and other infected or infested articles.

(9) Designation of eradication or treatment areas, announcement of treatment schedules and treatment eradication procedures.

(a) An area may be designated as a treatment or eradication area for the purpose of eradication of citrus canker, upon determination that citrus canker exists in the area, or is believed to exist in the area, or is located in proximity to an infection or infestation of citrus canker. Those areas shall be declared as treatment or eradication areas.

(b) Treatment or eradication areas shall be treated as recommended by the USDA and the department upon official declaration by the USDA or department as treatment or eradication areas. Treatments and methods to be used shall meet the requirements of federal and state regulatory agencies and may include removal and destruction of host fruit, trees, propagative materials (both sexual and asexual), and plant debris.

(c) Treatment may be applied by aircraft, ground vehicles, including tractors or equipment attached to such vehicles, hand carried equipment, aquatic and amphibious vehicles, or any other method of application prescribed by the USDA or the department.

(d) Announcement of treatment or eradication area designation and treatment schedule. Representatives of the USDA and department may, by oral order, designate an area as a treatment or eradication area. Such oral order shall become final when issued

in writing by the USDA or the department to the governing body of the county, precinct, city, political subdivision, or any minor civil division thereof, or the owner or representative of privately-owned property. A treatment area and treatment schedules may be declared by legal notice published in a local newspaper of general circulation, when affected privately-owned properties are too numerous to practically contact each owner or when such treatment or eradication areas are only a portion of a political subdivision.

(10) Provisions for eradication. Citrus canker is a highly contagious, infectious, highly destructive pathogen and a public nuisance. The department is empowered to destroy or order owners or persons having charge of premises where the disease is found, to destroy plants or objects which are infected or infested, or exposed to infection or infestation, or to carry out any measure deemed necessary to control the pathogen. Eradication procedures shall include:

(a) The destruction or treatment of infected or infested plants or parts of plants, or any plants or parts of plants exposed to infection or infestation, as prescribed by the division.

(b) The destruction or treatment of any infected or infested regulated article, or any article exposed to infection or infestation, as prescribed by the division.

(c) Orders issued for the destruction or treatment of infected plants, parts of plants, or plants or parts of plants exposed to infection or infestation, and for the destruction or treatment of regulated articles, issued by the department through any of its authorized representatives to owners or persons having charge of premises where citrus canker is found shall be binding, and compliance shall be forthwith, as prescribed by the department.

(d) Compensation shall not be awarded for the destruction of infected plants, plants exposed to infection or infestation, parts of plants, or for any damages to regulated articles resulting from any treatment prescribed by the department or USDA, except for any special provision for compensation that may be established by the Legislature or the Executive Branch of State Government for damages incurred as a result of carrying out any control or eradication procedure for citrus canker.

(11) Penalties for violation. Any person who shall violate any provision or requirement of this chapter shall be subject to the penalties of Sections 581.141 and 581.211, Florida Statutes. Specific Authority 120.54(9); 570.07(21), (23); 581.031(1), (4), (5) FS.

Law Implemented 570.07(2), (13), (21); 581.031(6), (7), (9), (15), (17); 581.083; 581.101; 581.141; 581.211 FS.

History - New

NAME OF PERSON ORIGINATING THE EMERGENCY RULE: Dr. Salvatore A. Alfieri, Director, Division of Plant Industry.

NAME OF PERSON WHO APPROVED THE EMERGENCY RULE: Doyle Conner, Commissioner of Agriculture, State of Florida.

5BER84-9 Citrus Canker Eradication

(1) Definitions. For the purpose of this rule chapter, the definitions in Section 581.011, Florida Statutes, and the following definitions shall apply:

(a) Budwood. A portion of a stem or branch with a vegetative bud or buds used in propagation by budding or grafting.

(b) Certificate. An official document stipulating compliance with the requirements of the department or the United States Department of Agriculture.

(c) Citrus. All members of the subfamily Aurantioideae, of the family Rutaceae according to Swingle and Reese, including any parts thereof.

(d) Citrus canker disease. A bacterial disease incited by *Xanthomonas campestris* pv. *citri* causing damage to leaves, shoots, and fruit of susceptible plants in the Rutaceae family.

(e) Common carrier. An individual or corporation licensed to transport persons, goods, or messages for compensation.

(f) Department. State of Florida Department of Agriculture and Consumer Services.

(g) Division. Division of Plant Industry, State of Florida Department of Agriculture and Consumer Services.

(h) Host plant. A plant or part thereof known or suspected to be capable of harboring or transporting citrus canker in any of its stages.

(i) Infected or infested. Actually harboring citrus canker, or so exposed to any stages of development of the citrus canker that it is reasonable to believe an infection or infestation could exist.

(j) International movement. Movement into Florida from a country outside the United States or movement from Florida to a country outside the United States.

(k) Interstate movement. Movement from Florida to another state or from another state to Florida.

(l) Intrastate movement. Movement from any part of the State of Florida to another part of Florida.

(m) Regulated areas: Any state or portion thereof including Florida and any county, precinct, city and other minor civil division designated by order of the department, the USDA, or the affected state as an area regulated due to the presence of citrus canker.

(n) Regulated articles: Any article, including soil, capable of transporting or harboring citrus canker.

(o) Rootstock. A plant used as the recipient understock in budding or grafting. This includes plants resulting from asexual reproduction (seedlings), and plants resulting from asexual reproduction, rooted cuttings, air layers (Murcotts), plants produced by tip grafting or meristematic culture, and plants resulting from nucellar embryos (nucellar seedlings).

(p) Shipment or shipments. The act or process of transferring or moving products from one point to another, or the products being transferred or moved.

(q) Scion. A portion of a citrus plant which includes at least one bud to be inserted into a rootstock to produce a new top of the desired clone.

(r) Scion Grove Tree. A citrus nursery tree grown in accordance with 5B-48.07 from budwood taken from a registered parent tree or Budwood Foundation Grove tree and registered with the division as a source of budwood.

(s) Treatment or eradication area. An area where it has been determined that citrus canker exists or is believed to exist or is located in such proximity to an infection or infestation of the disease that destruction of infected or infested material or treatments must be made to eliminate the disease.

(t) Suspect citrus canker infested or infected plant. A plant which has been subjected to infestation or infection by its presence in an infested area or having been removed from an infested area within a given period of time. See (4) (a), (b) and (c) of this rule.

(u) USDA. United States Department of Agriculture, Animal and Plant Health Inspection Service (APHIS).

(2) Purpose of rule chapter. This rule provides guidelines for implementing actions necessary to eradicate citrus canker from Florida.

(3) Declaration of citrus canker as plant pest. Pursuant to Section 581.031(6), Florida Statutes, the citrus canker disease incited by *Xanthomonas campestris* pv. *citri* is declared to be a plant pest and a nuisance as well as any plant or other thing infested or infected therewith or that has been exposed to infestation or infection and therefore likely to communicate same.

(4) Infested or infected status of a citrus tree due to its origin from a quarantined nursery or quarantined stock dealer is determined as follows:

(a) All citrus trees from any nursery or stock dealer declared infested or infected since January 1, 1984, are considered as infested or infected and are referred to in this rule as suspect citrus canker infested or infected plants; or

(b) All citrus trees from any nursery or stock dealer for which there is evidence that the nursery or stock dealer was infested or infected prior to January 1, 1984, shall be considered to have been infested or infected 4 months prior to the suspected time of

infestation and are referred to in this rule as suspect citrus canker infested or infected plants; or

(c) All citrus trees from any nursery or stock dealer which may be found infested or infected shall be considered to have been subject to infestation or infection 4 months prior to the evidence of infestation of the subject nursery and are referred to in this rule as suspect citrus canker infested or infected plants.

(5) Procedures to be followed in nurseries where plants as described as suspect citrus canker infested or infected plants are found:

(a) Destroy by burning or other methods as may be prescribed by the USDA or the department, any plant as described in (4) (a), (b) or (c) above.

(b) Destroy by burning or by other methods that may be prescribed by the USDA or the department all citrus plants within 125 feet of the plant described in (4) (a), (b) or (c) above.

(c) All hand and mechanized equipment, clothing and personnel, entering an infested nursery, or one in which suspect citrus canker infested or infected plants are found, must be disinfected as directed by the USDA or department before exiting the nursery.

(6) Proceedings to be followed in citrus groves where suspect citrus canker infested or infected plants from an infested nursery have been placed:

(a) Any citrus plant found to be infested or infected with citrus canker will be destroyed by burning or other methods as may be prescribed by the USDA or the department, and the plants occupying the two plant spaces in every direction from the infested or infected plant shall be defoliated as directed by the USDA or the department.

(b) Citrus groves in which a plant positive for citrus canker is found shall be sprayed with an Environmental Protection Agency registered copper containing pesticide at the rate of at least $\frac{3}{4}$ pound of actual copper per 100 gallons of water, after destruction of the infested or infected plants as in (a) above.

(c) Any suspect citrus canker infested or infected plant from an infested or infected nursery as described in (4) (a), (b) or (c) above, which upon examination is found to be apparently negative for citrus canker, shall be destroyed by burning or by other methods as prescribed by the USDA or the department. The surrounding four citrus plants in spaces adjacent to the suspect canker infested plant shall be sprayed with an Environmental Protection Agency registered copper containing pesticide at the rate of $\frac{3}{4}$ pounds of actual copper per 100 gallons of water to be applied immediately after destruction of the suspect citrus canker infested or infected plant as in (a) above.

(d) All equipment, both hand and mechanized, clothing and personnel, entering an infested grove or one in which suspect citrus canker infested or infected plants are found, must be disinfected as directed by the USDA or department before exiting the nursery.

(7) Budwood from the G. F. Ward Scion Grove (S-608): Nurseries which have received budwood from the G. F. Ward Scion Grove (S-608) will be held under quarantine for one year from receipt of material and examined for citrus canker within at least 30-day intervals.

(8) Shipment status of citrus fruit from groves in which a suspect citrus canker infested or infected plant is found:

(a) In groves where a citrus canker infested or infected plant is found to be positive for citrus canker, after the completion of the procedures outlined in (6) (a) and (b) of this rule are met, fruit may be moved only to a plant for processing.

(b) In groves where a suspect citrus canker infested or infected plant is found to be negative for citrus canker, after the completion of the procedures outlined in (6) (c) and (d) of this rule, the fruit can be moved under limited permit as prescribed by the USDA or the department.

(9) Entry of unauthorized persons into a quarantined area. It shall be unlawful for any person to enter any area quarantined due to its status as infested or infected with citrus canker unless authorized to enter by the director of the Division of Plant Industry or his designated representative.

(10) Penalties for violation. Any person who shall violate any provision or requirement of this chapter shall be subject to the penalties of Sections 581.141 and 581.211, Florida Statutes. Specific Authority 120.54(9); 570.07(21), (23); 581.031(1), (4), (5) FS.

Law Implemented 570.07(2), (13), (21); 581.031(6), (7), (9), (15), (17); 581. 083; 581.101; 581.141; 581.211 FS.

History - New

NAME OF PERSON ORIGINATING THE EMERGENCY
RULE: Dr. S. A. Alfieri, Jr., Director, Division of Plant Industry.
NAME OF PERSON WHO APPROVED THE EMERGENCY
RULE: Doyle Conner, Commissioner of Agriculture, State of
Florida.

**FLORIDA DEPARTMENT OF AGRICULTURE
& CONSUMER SERVICES**

TO: Mr. Bill Lambert, Jr.
Mid Florida Growers, Inc.
Rt. 1, Box 526
Bowling Green, FL 33834

IMMEDIATE FINAL ORDER

The Florida Department of Agriculture and Consumer Services issues this Immediate Final Order and says:

PARTIES

1. The Florida Department of Agriculture and Consumer Services is an agency of the State of Florida charged with the responsibility of enforcing the laws relating to agriculture in Florida.

2. Mid Florida Growers, Inc. is a nursery as defined in Chapter 581, Florida Statutes, and the rules promulgated thereunder.

AUTHORITY

3. This order is issued pursuant to the provisions of Sections 570.07(21), 120.59 and 581.031(6), (7) and (17), Florida Statutes, Rule 5B-45 and Emergency Rules 5BER84-8 and 5BER84-9, Florida Administrative Code. (Copies of rules attached.)

FINDINGS OF FACT

4. Mid Florida Growers, Inc. is a nursery located in Hardee County, Florida, more particularly described as:

SE ¼ of SE ¼ of SE ¼ of Section 17,
township 33 South, Range 25 East,
consisting of 2 acres, more or less.

5. Mid Florida Growers, Inc. received citrus trees from, or propagated from, a nursery infested or infected with citrus canker, *Xanthomonas campestris* pv. *citri*.

6. The Citrus Canker Technical Advisory Committee has recommended, and the department adopted by emergency rules,

treatment and eradication procedures for nurseries which received citrus trees from nurseries or stock dealers declared infested or infected with citrus canker. The department will implement those procedures in Mid Florida Growers, Inc.

ACTION ORDERED

7. Mid Florida Growers, Inc. is hereby designated a treatment or eradication area within the meaning of Emergency Rules 5BER84-8 and 5BER84-9, Florida Administrative Code.

8. All plants in Mid Florida Growers, Inc., received from a nursery or stock dealer declared infested or infected with citrus canker will be destroyed by burning or by other methods prescribed by the department or the United States Department of Agriculture (USDA).

9. In addition, all citrus plants within one hundred twenty five (125) feet of such plants will also be destroyed in like manner.

10. This eradication procedure will be accomplished within ten days of receipt of this order, or as soon thereafter as is practicable.

CONCLUSIONS OF LAW

11. Article IV Section 4(f) of the Florida Constitution gives the Commissioner of Agriculture the supervision of matters pertaining to agriculture except as otherwise provided by law. He has authority under Section 570.07(21), Florida Statutes, to declare an emergency when such exists and promulgate rules which would be effective during the terms of such emergency.

12. Further, Chapter 581, Florida Statutes, gives the department broad powers in the containment, treatment or eradication of plant pests and diseases. Specifically, in Section 581.031, Florida Statutes, it has the power and duty to: (6) declare a plant pest or any plant infested or infected, or exposed thereto, a nuisance; (7) to declare a quarantine; and (17) to supervise the treatment, cutting and destruction of infested plant or plants reasonably exposed to infestation.

13. Finally, in the promulgation of Emergency Rules 5BER84-8 and 5BER84-9, the department established the procedures for setting out quarantine, regulated, and treatment or eradication

areas; movements of regulated articles; determination of the status of infested or infected citrus trees; sanitation methods and other conditions of quarantine and treatment. Rule 5B-45, Florida Administrative Code, also pertains.

14. On September 11, 1984, the U. S. Secretary of Agriculture declared an emergency because of citrus canker and authorized the transfer of such funds as are necessary to conduct a program to detect, identify and eradicate citrus canker wherever found. The United States Department of Agriculture also proposed an amendment to the "Domestic Quarantine Notices" by adding a new "Subpart Citrus Canker" to prevent the artificial spread of the disease into noninfested areas of the United States.

FINDINGS OF IMMEDIATE THREAT

15. On August 27, 1984, citrus canker *Xanthomonas campestris* pv. *citri* was detected in a Central Florida citrus tree nursery. Citrus canker is one of the most destructive diseases of citrus and has been eradicated from the State of Florida one time in the early part of the 20th century at a cost of \$2,422,326.00. When the disease first appeared in Florida in 1914, drastic measures were taken to rid the state of the disease. These measures included the destruction of many citrus trees and contaminated articles. Florida was not declared free of the disease until 1927. In view of the destructive nature of this pathogenic bacterial organism and in view of its pressing occurrence within the State of Florida, immediate steps must be taken to eradicate citrus canker before the infected area expands and results in economic disaster for Florida's 1.2 billion dollar citrus industry and ultimately adversely affects the welfare of the citizenry of the State of Florida. In view of the specific facts and reasons above mentioned, and in accordance with the constitutional authority conferred upon the Commissioner of Agriculture by the Florida Constitution, Article IV, Section 4, and with the authority stated in Florida Statutes, Sections 570.07(21) (to declare an emergency) and 581.031(7), I do hereby find that an immediate danger to the public health, safety and welfare exists, justifying the issuance of this Immediate Final Order.

APPEALABILITY

16. This order is appealable or enjoinalable from the date rendered.

Done and ordered at Winter Haven, Florida this 16th day of October, 1984.

ROBERT A. CHASTAIN
General Counsel

DOYLE CONNER
Commissioner of Agriculture

By: /s/ Charles Poucher
Project Director

/s/ Gordon Johnson
Gordon Johnson
Deputy Project Director
U.S. Department of Agri.

FRANK A. GRAHAM
Resident Counsel
Department of Agriculture
and Consumer Services
Room 515, Mayo Building
Tallahassee, Florida 32301
Phone: 904/488-6853

**FLORIDA DEPARTMENT OF AGRICULTURE
& CONSUMER SERVICES**

TO: Mr. Joe Himrod
Himrod & Himrod Citrus Nursery
Rt. 1, Box 49A
Bowling Green, FL 33834

IMMEDIATE FINAL ORDER

The Florida Department of Agriculture and Consumer Services issues this Immediate Final Order and says:

PARTIES

1. The Florida Department of Agriculture and Consumer Services is an agency of the State of Florida charged with the responsibility of enforcing the laws relating to agriculture in Florida.

2. Himrod & Himrod Citrus Nursery is a nursery as defined in Chapter 581, Florida Statutes, and the rules promulgated thereunder.

AUTHORITY

3. This order is issued pursuant to the provisions of Sections 570.07(21), 120.59 and 581.031(6), (7) and (17), Florida Statutes, Rule 5B-45 and Emergency Rules 5BER84-8 and 5BER84-9, Florida Administrative Code. (Copies of rules attached.)

FINDINGS OF FACT

4. Himrod & Himrod Citrus Nursery is a nursery located in Hardee County, Florida, more particularly described as:

S $\frac{3}{4}$ of E $\frac{1}{2}$ of SW $\frac{1}{4}$ and the
S $\frac{3}{4}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of
Section 8, Township 33 South,
Range 25 East, consisting of
0.6 acre, more or less.

4. Himrod & Himrod Citrus Nursery received citrus trees from, or propagated from, a nursery infested or infected with citrus canker, *Xanthomonas campestris* pv. *citri*.

6. The Citrus Canker Technical Advisory Committee has recommended, and the department adopted by emergency rules, treatment and eradication procedures for nurseries which received citrus trees from nurseries or stock dealers declared infested or infected with citrus canker. The department will implement those procedures in Himrod & Himrod Citrus Nursery.

ACTION ORDERED

7. Himrod & Himrod Citrus Nursery is hereby designated a treatment or eradication area within the meaning of Emergency Rules 5BER84-8 and 5BER84-9, Florida Administrative Code.

8. All plants in Himrod & Himrod Citrus Nursery received from a nursery or stock dealer declared infested or infected with citrus canker will be destroyed by burning or by other methods prescribed by the department or the United States Department of Agriculture (USDA).

9. In addition, all citrus plants within one hundred twenty five (125) feet of such plants will also be destroyed in like manner.

10. This eradication procedure will be accomplished within ten days of receipt of this order, or as soon thereafter as practicable.

CONCLUSIONS OF LAW

11. Article IV Section 4(f) of the Florida Constitution gives the Commissioner of Agriculture the supervision of matters pertaining to agriculture except as otherwise provided by law. He has authority under Section 570.07(21), Florida Statutes, to declare an emergency when such exists and promulgate rules which would be effective during the term of such emergency.

12. Further, Chapter 581, Florida Statutes, gives the department broad powers in the containment, treatment or eradication of plant pests and diseases. Specifically, in Section 581.031, Florida Statutes, it has the power and duty to: (6) declare a plant pest or any plant infested or infected, or exposed thereto, a nuisance; (7) to declare a quarantine; and (17) to supervise the treatment, cutting and destruction of infested plant or plants reasonably exposed to infestation.

13. Finally, in the promulgation of Emergency Rules 5BER84-8 and 5BER84-9, the department established the procedures for setting out quarantine, regulated, and treatment or eradication areas; movements of regulated articles; determination of the status of infested or infected citrus trees; sanitation methods and other conditions of quarantine and treatment. Rule 5B-45, Florida Administrative Code, also pertains.

14. On September 11, 1984, the U. S. Secretary of Agriculture declared an emergency because of citrus canker and authorized the transfer of such funds as are necessary to conduct a program to detect, identify and eradicate citrus canker wherever found. The United States Department of Agriculture also proposed an amendment to the "Domestic Quarantine Notices" by adding a new "Subpart Citrus Canker" to prevent the artificial spread of the disease into noninfested areas of the United States.

FINDINGS OF IMMEDIATE THREAT

15. On August 27, 1984, citrus canker *Xanthomonas campestris* pv. *citri* was detected in a Central Florida citrus tree nursery. Citrus canker is one of the most destructive diseases of citrus and has been eradicated from the State of Florida one time in the early part of the 20th century at a cost of \$2,422,326.00. When the disease first appeared in Florida in 1914, drastic measures were taken to rid the state of the disease. These measures included the destruction of many citrus trees and contaminated articles. Florida was not declared free of the disease until 1927. In view of the destructive nature of this pathogenic bacterial organism and in view of its pressing occurrence within the State of Florida, immediate steps must be taken to eradicate citrus canker before the infected area expands and results in economic disaster for Florida's 1.2 billion dollar citrus industry and ultimately adversely affects the welfare of the citizenry of the State of Florida. In view of the specific facts and reasons above mentioned, and in accordance with the constitutional authority conferred upon the Commissioner of Agriculture by the Florida Constitution, Article IV, Section 4, and with the authority stated in Florida Statutes, Sections 570.07(21) (to declare an emergency) and 581.031(7), I do hereby find that an immediate danger to the public health, safety and welfare exists, justifying the issuance of this Immediate Final Order.

APPEALABILITY

16. This order is appealable or enjoinable from the date rendered.

Done and ordered at Winter Haven, Florida this 16th day of October, 1984.

ROBERT A. CHASTAIN
General Counsel

DOYLE CONNER
Commissioner of Agriculture

By: /s/ Charles Poucher
Charles Poucher
Project Director

/s/ Gordon Johnson
Gordon Johnson
Deputy Project Director
U.S. Department of Agri.

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